CASE WESTERN RESERVE
UNIVERSITY
SCHOOL OF LAW

I realize that you will see a mind-numbing array of resumes, transcripts, and letters of recommendation. Please, please, take the time to meet with Ms. King in person. I have no doubt that she will be an asset to your chambers and to any office lucky enough to employ her.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Raymond Ku

Raymond Ku
Signed Electronically

August 28, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is a pleasure to recommend Melanie King as a prospective judicial clerk. Melanie is very bright and highly motivated, writes well, and pays careful attention to detail. She has all the talent and personal qualities to make a fine clerk and an outstanding lawyer.

I have gotten to know Melanie quite well during her first two years of law school. She was a fine student in my first-year elective that focused on the NAACP's litigation campaign against segregation, and she wrote a first-rate Note in the seminar I teach for second-year members of our Law Review. She will be serving as online editor for the Law Review during her third year and already has been working hard to enhance the Review's online presence.

Melanie helped to carry the discussion in the first-year elective, and she wrote a really thoughtful paper evaluating the NAACP's litigation strategy. This course helps students to think analytically about efforts to use the legal system to promote reform. It is particularly challenging for first-year students who have not yet studied Constitutional Law, because they need to understand now-discredited doctrines reflected in cases like *Plessy v. Ferguson* but also to see how that doctrine could be challenged prospectively. Melanie clearly was up to these challenges and threw herself enthusiastically into the materials. I could always count on her to advance the discussion, and I found her paper a pleasure to read. She brought a healthy skepticism to her analysis of the NAACP's work, but the paper clearly reflected a sophisticated understanding of the magnitude of the accomplishments of Charles Houston and Thurgood Marshall coupled with a realistic appreciation of the limits of what courts can accomplish.

Melanie's Note reflected her passion for copyright issues. She wrote a hard-nosed analysis of YouTube's policies for dealing with alleged infringement in uploaded videos. Her Note showed a detailed understanding of the relevant legal doctrines as well as an ability to get into the details of both YouTube's approach and alternative methods for a more useful way of handling claims of copyright infringement. It was gracefully written, clearly organized, thoroughly researched, and thoughtfully argued.

Melanie has compiled a strong overall record in law school, so her achievements for me are representative of her performance here. She got the top grades in both Copyright Law and Business Associations, and she also has been a research assistant for one of my colleagues who is a prominent scholar in intellectual property. Beyond that, she also was a very effective coordinator for our team that competed successfully in the ABA's National Advocacy Competition and also was a standout performer in our own moot court competition, winning the award for having the best overall combined brief and oral scores in the seeding rounds.

In short, Melanie King brings an unusual combination of talent and experience to a clerkship. As a former judicial clerk, I am delighted to recommend her to you. Thank you so much for your consideration. Please let me know if I can be of further assistance.

Sincerely,

Jonathan L. Entin
David L. Brennan Professor Emeritus of Law
Case Western Reserve University
216-368-3321 (phone)
jle@case.edu (e-mail)

No. 20-CR-0404

In the

# United States Court of Appeals for the Twelfth Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

MAURA MCLAUGHLIN,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RESERVE
CRIMINAL CASE NO. 19-CR-02265

## BRIEF OF APPELLEE

Melanie King

## Table of Contents

## Table of Authorities

Cases

**Statutes**

## Jurisdictional Statement

The district court for the District of Reserve had jurisdiction over this case under 18 U.S.C. § 3231 because McLaughlin was charged with a federal crime. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the district court's judgment on July 18, 2019, is a final order. R. 33. McLaughlin filed a timely notice of appeal on August 1, 2019. R. 35.

## Statement of the Issues

Issue 1: The Supreme Court interprets 18 U.S.C. § 1346 to criminalize honest-services wire fraud in cases of bribery and kickbacks in violation of a fiduciary duty, and does not required that the fiduciary duty arise out of state law. Employees owe a fiduciary duty to their employers. McLaughlin wired hundreds of thousands of dollars through a non-profit to buy her daughters' entrance to a public university. Does the well-settled agency doctrine that employees owe a fiduciary duty to their employers provide the fiduciary duty necessary to find a defendant guilty of honest-services wire fraud?

Issue 2: Judicial recusal doctrine bars recusal in cases of judge-shopping, which includes adding an attorney whose presence would force a judge to recuse under 28 U.S.C. § 455 after learning the judge assigned to the case. McLaughlin added an attorney employed by the same firm employing the trial judge's niece three days after learning who the trial judge would be. Should this Court affirm that the trial judge did not abuse his discretion when he refused to disqualify himself?

## Statement of the Case

### A. McLaughlin Joins a Scheme to Commit Honest-Services Fraud

Maura McLaughlin is a 55-year-old actress from the City of Reserve. R. 46, 55. Beginning in or about 2015, McLaughlin began working closely with a cooperative witness ("CW") to facilitate the entrance of her two daughters to the University of Reserve as student athletes. R. 58. With CW's help, McLaughlin paid $500,000 in various increments to multiple actors who helped to: (1) falsify ACT and SAT college entrance exams on behalf of McLaughlin's children, (2) falsify athletic profiles claiming the children were accomplished rowers, and (3) secure conditional acceptance to the University of Reserve for her daughters as student athletes. R. 58–63. CW founded two organizations: The Advantage, a for-profit college-counseling business, and The Society for the Creation of Advantage and Merit ("SCAM"), a federal tax-exempt non-profit. R. 56. This non-profit, SCAM, was the key to McLaughlin and CW's college-entrance scheme.

#### 1. McLaughlin Engages in a Standardized-Test Scheme

The ACT and the SAT are standardized tests most selective colleges require as admissions prerequisites. R. 58. These tests are

typically administered by test administrators who certify they will comply with ACT and SAT coordinator manuals, and that they will ensure no one but the student will "open a test book and see the test content." R. 58–59.

To obtain false ACT and SAT scores for her daughters, McLaughlin agreed to pay $75,000 for each falsified test as donations to SCAM. R. 60. CW directed SCAM's accountant to use McLaughlin's "donations" to bribe Garrison, a college-entrance exam test administrator, into allowing a someone other than McLaughlin's daughters to take the exams on their behalves. R. 60. SCAM typically paid Garrison $10,000 per student per test. R. 60. Garrison allowed a false test-taker to take the ACT and SAT in violation of the honest services he owed to his employers, ACT, Inc. and the College Board. R. 60. He then returned the falsified exams to ACT, Inc. and the College Board via FedEx and UPS for scoring. R. 60.

**2. McLaughlin Engages in an Athlete Recruitment Scheme**

McLaughlin paid CW approximately $350,000 to bribe athletic administrators at the University of Reserve to secure conditional acceptance of her children as student athletes. R. 61. CW

directed Karen Eiffel, an employee of The Advantage and SCAM, to help falsify documents to build a prospective athlete profile on behalf of McLaughlin's daughters. R. 61. CW arranged with Coach Middlebrooks, head coach of the women's crew team at the University of Reserve, to facilitate the recruitment of each daughters as freshmen rowers. R. 61.

After Eiffel and Coach Middlebrooks fully developed the girls' profiles as purported rowers, the athletic admissions subcommittee at the University of Reserve granted each daughter's conditional acceptance—one in October 2016 and the second in December 2017. After her first daughter's acceptance, CW instructed McLaughlin via email to mail a $50,000 check—payable to the University of Reserve—to Coach Middlebrooks at his office address and she complied. R. 62. After her second daughter's acceptance, CW directed McLaughlin to make a second "donation" of $50,000, this time to an athletic department account at the University of Reserve controlled by Coach Middlebrooks and she again complied. R. 62.

After each conditional acceptance, SCAM's accountant sent McLaughlin an invoice for $125,000 claiming the invoice was for a "pledge" McLaughlin had "made" to SCAM. R. 62. McLaughlin then

wired $125,000 into one of the SCAM charitable accounts. She made identical payments after the conditional acceptance of both daughters. R. 62, 63.

### B. Trial Judge Denies McLaughlin's Motion for Disqualification

McLaughlin received her first summons and entered her first notice of attorney appearance on February 1, 2019. R. 1. Attorney Louis Pohl appeared on her behalf. R. 1. Three days later, Pohl moved to reschedule McLaughlin's arraignment and initial appearance. R. 1. Judge Dredd, the only judge presiding over McLaughlin's case, denied Pohl's motion and held the arraignment as scheduled on February 7, 2019. R. 2.

The day before McLaughlin's arraignment and initial appearance, Freida Cahn Vick filed a notice of appearance on McLaughlin's behalf. R. 2. On the day of the arraignment hearing, Vick filed a motion for disqualification—also known as a motion for recusal—on McLaughlin's behalf. R. 2. Vick's law firm, Knight Weeks, also employs Judge Dredd's niece in a different department. R. 22. When Judge Dredd learned of the defense's motion, he immediately asserted the defense was "shameless[ly] judge shopping." R. 21. Judge Dredd maintained that he

consulted ethics counsel and determined he was not required to recuse because his niece was only a partner in the trust and estate practice at Knight Weeks. R. 22. After denying the motion for recusal, Judge Dredd issued an opinion and order denying the defense's motion to dismiss the indictment, in which the defense argued the statute by which the government charged McLaughlin does not apply to her. R. 30–33. She appeals in part this decision.

### C. Trial Judge Holds a Bench Trial

Following the trial judge's denial of McLaughlin's motion to disqualify, the parties met for a final pretrial conference on May 13, 2019. R. 43. McLaughlin stipulated to the facts in the indictment, claiming preparedness to "accept responsibility" and avoid a jury trial. R. 44. The trial judge ensured that McLaughlin's jury trial waiver was knowing, intelligent and voluntary. R. 45. Based on the trial judge's findings of law that honest-services fraud does not require a state-law source, the trial judge accepted McLaughlin's stipulated facts and entered a judgment of guilt against her. R. 49–52. McLaughlin appeals in part from this judgment. R. 75.

## Summary of the Argument

The trial court properly concluded that McLaughlin's payments to Coach Middlebrooks and test administrator through a non-profit entity constituted a scheme to violate honest services in violation of 18 U.S.C. § 1343 and 1346. Because of this violation, the trial court properly denied her motion to dismiss. A person commits wire fraud when she devises a scheme to defraud another, including inducing someone to violate the honest services that person owes to another.

Employees who breach their fiduciary duty to their employers violate their employer's right of honest services. McLaughlin made a series of false "donations" to induce a crew coach and a standardized test administrator into falsifying records to gain her daughters admission to the University of Reserve, a public university. When Coach Middlebrooks and test administrator complied, they did so in violation of the fiduciary duties of good faith, loyalty, and care all employees owe their employers—regardless of state law—and thus violated their employers' intangible right of honest services. Because all employees owe fiduciary duties to their employers, no state law-provided fiduciary duty is required to violate § 1343 and § 1346.

The trial court also properly denied McLaughlin's motion to disqualify. McLaughlin cannot overcome the presumption of judge shopping she created by adding a conflict-causing attorney after learning the district judge assigned to the case. McLaughlin hired a second counsel from the same firm as the judge's niece five days after learning who the judge would be. Adding an attorney after the start of litigation who would force recusal under 28 U.S.C. § 455 creates a presumption the defendant is judge shopping, which the defendant has the burden of disproving. Even without a presumption of judge shopping, the judge's niece does not have an interest that would be substantially affected by the outcome of this case—as required by § 455(b)(5)(iii)—so the judge was not required to disqualify himself.

## Argument

### I. Because McLaughlin engaged in a scheme to deprive employers of their honest-services in violation of an employee's fiduciary duty, the trial court properly entered a judgment of guilt against McLaughlin.

This Court should affirm the trial court's judgment of guilt against McLaughlin for two reasons. First, under Supreme Court precedent, McLaughlin's payments to Coach Middlebrooks and to the test administrator constituted a scheme to deprive their employers of honest services. *Skilling v. United States*, 561 U.S. 358 (2010). Second, the fiduciary duty required to commit honest-services fraud does not need to arise out of state law. *Id.*

Courts of appeal review motions to dismiss criminal indictments under a *de novo* standard of review. *United States v. McGee*, 763 F.3d 304, 312 (3d Cir. 2014).

#### A. McLaughlin's payments to Coach Middlebrooks and to the test administrator through a non-profit constituted a scheme to deprive honest services.

When McLaughlin funneled money to Coach Middlebrooks and the test administrator through a non-profit, SCAM, she did so to induce them to violate the fiduciary duty they owed their employers. Such a scheme constitutes wire fraud under 18 U.S.C. § 1343. Under 18 U.S.C.

§ 1343, a person commits wire fraud when she "devise[s] any scheme or artifice to defraud" and transmits money by means of wire to commit that scheme. To clarify this definition, Congress enacted 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" as "a scheme or artifice to deprive another of the intangible right of honest services."

Courts have long recognized that employees owe a fiduciary duty to their employers. *United States v. Procter & Gamble*, 47 F. Supp. 676, 678 (Mass. 1942). As agents, employees owe a "general duty of full disclosure respecting matters affecting the principal's interests and a general prohibition against the fiduciary's using the relationship to benefit his personal interest, except with the full knowledge and consent of the principal." *Rash v. J.V. Intermediate, Ltd.*, 498 F.3d 1201 (10th Cir. 2007) (quoting *United Teachers Ass'n Ins. Co. v. MacKeen & Bailey, Inc.*, 99 F.3d 645, 650 (5th Cir. 1996)). When individuals induce an employee to breach his duty to his employer, they are effectually "defrauding the employer of a lawful right." *Skilling*, 561 U.S. at 401 (quoting *Procter & Gamble*, 47 F. Supp. at 678). Coach Middlebrooks, as an agent of the University of Reserve, and the test administrator, as an agent of ACT, Inc. and the College Board, owe their principals a general

duty of full disclosure. By allowing a false test taker to take standardized tests on behalf of McLaughlin's daughters and mailing those exams to ACT, Inc. and the College Board, the test administrator violated his fiduciary duty to his employer. By falsifying crew record profiles to facilitate conditional acceptance of McLaughlin's daughters to the University of Reserve, Coach Middlebrooks also breached his fiduciary duty to his employer.

Even if an individual does not owe a fiduciary duty herself, inducing another to breach his fiduciary duty still constitutes a scheme under § 1343 and § 1346. *United States v. Urciuoli*, 613 F.3d 11 (1st Cir. 2010). The mail and wire fraud statutes "by their terms cover anyone who engages in a 'scheme' to deprive others of the intangible right to honest services.'" *Id.* at 17. McLaughlin induced Coach Middlebrooks and the test administrator to breach their duties to their employers by wiring them tens of thousands of dollars each through SCAM. While McLaughlin does not herself owe a duty to the public or an employer, the clear breach she induced by two employees constitutes a scheme to violate their employers' right to honest services.

### B. The fiduciary duty required to commit honest-services fraud does not need to arise out of state law.

Because the Supreme Court already limited honest-services fraud to instances of bribery and kickbacks, this Court need not hold that the fiduciary duty necessary to commit honest-services fraud arises out of state law. *Skilling*, 561 U.S. at 413. The *Skilling* Court recognized the "solid core" of honest-services fraud as follows: "The 'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 407. Describing the employee-employer relationship as being a fiduciary relationship "usually beyond dispute," the Court held that § 1346 is not exclusive to federal public officials, but also encompasses "state and local corruption" as well as "private-sector fraud." *Id.* at n. 43, 45. The Court's holding in *Skilling* clearly includes the conduct of Coach Middlebrooks and the test administrator. As agents who agreed to violate their fiduciary duty in return for financial compensation, Coach Middlebrooks and test administrator participated in a bribery scheme.

McLaughlin argues that this Court should adopt the state-law limiting principle followed only by the Third and Fifth Circuits. This Court should not adopt this principle; even the language of *United*

*States v. Panarella*, 277 F.3d 678 (3d Cir. 2001), decided nine years before *Skilling*, undermines this argument. In a holding that only discussed the conduct of public officials, *id.* at 691, the Third Circuit was attempting to clarify the mail and wire fraud statutes, which have since been clarified by the Supreme Court in *Skilling*—who neither adopted nor relied on the Third Circuit's rule. *See Skilling*, 561 U.S. at 400–415.

The Third Circuit wanted to clarify when the wire fraud statute applied to public officials. Noting a history of cases finding honest-services fraud despite no evidence of bribery, kickbacks, or other criminal law, the Third Circuit "fixed" the problem by limiting based on state criminal law. *Panarella*, 277 F.3d at 692–93. Further elaborating in *United States v. Gordon*, 183 Fed. Appx. 202 (3d Cir. 2006), also decided before *Skilling*, the Third Circuit relied on principles of federalism to justify its limiting factor. *Id.* at 210–11. The Third Circuit did not hold that its state-law limiting factor was absolute, though: "At the very least, the government must allege a violation of some law—or a recognized fiduciary duty—to adequately charge honest services fraud." *Id.* at 211. Unlike the private employee-employer relationship, states

may have an interest in determining the code of conduct they expect from their public officials. In contrast, modern employees often work for companies of a national character—like, for example, ACT, Inc. and the College Board. Agency law is well-settled in the national marketplace for this very reason.

The Supreme Court addressed this exact issue in *Skilling*, but limited honest-services fraud in a different way, removing any need to use state law as a limiting factor. *Compare Skilling*, 561 U.S. at 691, *with Panarella*, 277 F.3d at 692. Honest-services fraud has a fraught history full of courts unsure how to apply the vague "intangible right to honest services" without any guidance from Congress. The Supreme Court initially put a stop to this confusion through its holding in *McNally v. United States*, 483 U.S. 350 (1987), which invalidated intangible rights completely and held the federal mail and wire fraud statutes to only protect traditional property rights. *Id.* at 360. The Court in *McNally* challenged Congress to expressly protect intangible rights if it wanted such protection; Congress did exactly that by enacting § 1346.

Putting to bed any future claims of vagueness, the Court held that "a criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Skilling*, 561 at 413. Unlike after *McNally*, when Congress rushed to clarify the meaning of § 1343 to specifically criminalize honest-services fraud, Congress did not amend § 1346 post-*Skilling* to only criminalize fiduciary duties arising under state law. Congress easily could have, and indeed the Court urged it to "speak more clearly than it has" if it wished to "go further" than the Court's understanding of culpable conduct. *Skilling*, 561 U.S. at 411. For a court to require a need for state law violation would likely cross the line into judicial legislation rather than "preserving a statute through a limiting interpretation." *Id.* at n. 43. Courts know what a fiduciary duty is, and know which relationships give rise to one. Limiting which fiduciary relationships may give rise to a violation of federal law is exclusively the right of Congress. *Id.*

While § 1346 does not defer to other statutes to define "bribery" and "kickbacks,"—nor does it limit its definitions to those found in similar statutes—similar statutes provide some guidance in

understanding § 1346's terms. *Id.* at n. 45. In 41 U.S.C. § 53(2), a statute the Supreme Court cited in *Skilling* for its useful definition, kickback means "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances]." *Skilling*, 561 at 412–13. The scheme McLaughlin perpetuated clearly violates this standard. When McLaughlin wired money as "donations" through SCAM to the test administrator or as "donations" to the University of Reserve to Coach Middlebrooks, she was providing money in exchange for favorable treatment in her daughters' admission process. The Supreme Court is clear on what conduct violates § 1343 by limiting it to bribery and kickbacks, with no need to further clarify by limiting to state law.

## II. The trial court properly denied McLaughlin's motion to disqualify because McLaughlin added a conflict-causing attorney after learning the judge assigned to the case, which creates a presumption of judge shopping.

This Court should affirm the trial court's denial of McLaughlin's motion to disqualify for two reasons. First, adding an attorney that would force a judge's recusal after learning the judge assigned to the

case constitutes judge shopping and is barred by the judicial recusal doctrine. Second, even if McLaughlin was not judge shopping, the trial judge did not violate § 455(b)(5)(iii) because his niece did not have an interest that would be substantially affected by the case's outcome.

Courts of appeal review motions to disqualify a judge under the abuse-of-discretion standard of review. *Burke v. Regalado*, 935 F.3d 960, 1052 (10th Cir. 2019).

### A. Adding an attorney that would force a judge's recusal after learning the judge assigned to the case creates a presumption of judge shopping McLaughlin cannot overcome, even under 28 U.S.C. § 455(a).

The judicial-recusal doctrine does not allow for judge shopping. Even under 28 U.S.C. § 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," a judge need not do so if the party is "contriving to engineer the recusal of a district judge" by hiring an attorney who would force recusal under § 455. *In re BellSouth Corp.*, 334 F.3d 941 (11th Cir. 2003). In *BellSouth*, the defendant hired the judge's nephew after learning the judge assigned to the case. *Id.* at 942. Recognizing that "there is no absolute constitutional guarantee of the attorney of one's choice," the Eleventh Circuit in *BellSouth* agreed with

the Fifth Circuit's belief that a court may disqualify counsel when chosen solely or primarily for the purpose of disqualifying the judge. *Id.* at 946 (citing *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976)).

Because of the "practical impossibility of proving a party's true motive for hiring a particular attorney," the Eleventh Circuit has created a non-exclusive list of factors for courts to consider in evaluating motions for recusal in the late stages of litigation. *Id.* at 947. The court weighs the following factors: "the fundamental right to counsel, the court's docket, the injury to the plaintiff, the delay in reaching a decision, the judicial time invested, the expense to the parties objecting, and the potential for manipulation or impropriety." *Id.* at 944 (quoting *Robinson v. Boeing Co.*, 79 F.3d 1053, 1055 (11th Cir. 1996)). Without the conflict-causing attorney, McLaughlin would still have had counsel, just not the counsel of her choice—to which she does not have a fundamental right. Judge Dredd had the discretion to determine whether the delay caused by both delaying the arraignment and granting the motion for disqualification weighed too heavily against recusal, and he did.

A presumption of judge-shopping outweighs an appearance of impartiality under § 455(a). *See id.* at 956–957; *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1264 (5th Cir. 1983). Citing the Fifth Circuit's decision in *McCuin*, the Eleventh Circuit explained that when a trial court refuses to recuse under § 455(a) because of a presumption of judge-shopping, it does so because such "manipulation" is "an obstruction of the orderly administration of justice." *BellSouth*, 334 F.3d at 957. McLaughlin cannot overcome this presumption. Judge Dredd did not abuse his discretion when he decided not to recuse.

### B. Even if McLaughlin was not judge shopping, the judge did not violate § 455(b)(5)(iii) because his niece does not have an interest that would be substantially affected by the case's outcome.

Judge Dredd's niece did not have an interest that would be substantially affected by the outcome of the case. A judge considering a motion for disqualification under the "substantially affected" provision of § 455 must consider the remoteness of the interest and its degree; a sufficiently remote and speculative interest does not warrant disqualification. *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976). His niece's firm is not a party to the case, but rather is representing a party and can easily be replaced. McLaughlin is a

criminal defendant; she will not be winning damages in a civil suit that may affect a litigator.

Judges are not per se disqualified when a partner in defense counsel's firm is related to the judge. *Pashaian v. Eccleston Properties, Ltd.*, 88 F.3d 77 (2d Cir. 1996). "It would simply be unrealistic to assume . . . that partners in today's law firms invariably 'have an interest that could be *substantially affected* by the outcome of' any case in which the partner is involved." *Id.* at 83 (quoting § 455(b)(5)(iii)). Judge Dredd's niece is not a litigator, and does not even work in the same department as McLaughlin's conflict-causing counsel. She does not have an interest in the case at all, and certainly does not have one that would be substantially affected by the outcome of the case. Judge Dredd consulted ethics counsel, R. 22, and stood by the reasoning of the Second Circuit in *Pashaian*; his niece's employment at a firm does not preclude anyone from that firm every practicing before him.

Receiving income based on the length of litigation is also not a substantial financial interest strong enough to disqualify a judge. *United States. v. Apple Inc.*, 992 F. Supp. 2d 263 (S.D.N.Y. 2014). In *Apple*, the fact that a court-appointed monitor would receive an hourly

wage did not constitute grounds for disqualification, despite the contention that the scheme creative incentive for the monitor to conduct "as lengthy of investigation as possible." *Id.* at 285. Even if Judge Dredd's niece were to receive a speculative payment because of the total time required to resolve the case, that would not be reason to disqualify the trial court judge. The record indicates he did not abuse his discretion on this count either. He afforded the defendant a bench trial to resolve the case as efficiently as possible. R. 50.

The "substantially affected" doctrine of judicial recusal only requires automatic disqualification when a judge knows of a relative's interest in a case. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980). McLaughlin would like for this Court to read *Potashnick* as a per se disqualification rule, but the Fifth Circuit's rule is simply not that harsh. In *Potashnick*, the Fifth Circuit determined a trial judge should have recused himself under § 455(b)(iii) because his father was a name partner at the firm representing a party in the case. *Id.* at 1113. The party moving for recusal presented evidence that the judge's father received a one percent share of the firm's income. *Id.* McLaughlin has provided no evidence of such a financial interest here.

His niece is not a name partner at Knight Weeks; she only began working at the firm a month prior to McLaughlin's first appearance. She is not assigned to McLaughlin's case, and McLaughlin has provided no evidence that the niece will receive direct compensation for Knight Weeks's services in McLaughlin's case. Because his niece did not have a substantial interest that would be affected by the outcome of McLaughlin's case, Judge Dredd was not required to recuse under any of the subsections of 28 U.S.C. § 455(b)(5)(iii).

## Conclusion

The judicial recusal doctrine does not allow for judge shopping. When McLaughlin added an attorney who would "force" recusal after she learned the judge assigned to the case, McLaughlin created a presumption of judge shopping. This court was correct in denying a writ of mandamus, and should not order the trial judge to recuse now.

A fiduciary duty necessary to support a charge of honest-services fraud need not arise out of state law. Employees owe a fiduciary duty to their employers. The defendant's scheme defrauded both public and private actors of their right to honest services. This Court should affirm the trial court's decision that McLaughlin was guilty of two counts of wire fraud.

## Appendix A

## CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AND THE 2019-2020 DEAN DUNMORE MOOT COURT COMPETITION RULES AND REGULATIONS

### Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) as incorporated in and modified by The Dunmore Competition Rules because this brief contains 4,383 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) and the type style requirements of Fed. R. App. P. 32(a) as modified by 2019–2020 Dean Dunmore Moot Court Competition Rules and Regulations because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in "Century" 14-point size.

Melanie King
Attorney for the United States

/s/ Melanie King
February 4, 2020

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

ABC, Inc.,

Plaintiff,

v.

Dr. Jian "Larry" Smith; Dr. Guanglu Jones; and Beijing Medical Scientific Co. Ltd. *d/b/a* MedCo,

Defendant.

Case No. 1:19cv00

Judge Michael R. Barrett

Magistrate Judge Stephanie Bowman

**OPINION & ORDER**

This matter is before the Court upon Defendants Dr. Jian Smith and MedCo's Rule 12(b)(2) Motion to Dismiss or, in the Alternative, Dismissal under *Forum Non Conveniens* in favor of the People's Republic of China. (Doc. 22). Plaintiff ABC, Inc. has filed a Response in Opposition (Doc. 32) and Defendants filed a Reply. (Doc. 33). As of the time of Defendants' Reply, only Defendants Smith and MedCo have been served in this case. For the reasons described below, Defendants Motion to Dismiss is **DENIED**.

## I. BACKGROUND

Plaintiff brings eight causes of action against Defendants, including tortious interference, misappropriation of trade secrets, unfair competition, deceptive trade practices, fraud, negligent misrepresentation, aiding and abetting, and civil conspiracy (Doc. 1). According to the Complaint, Plaintiff ABC is an Ohio-based company that makes and distributes medical devices worldwide. (Doc. 1, ¶ 1). ABC began a business relationship with Defendants Smith and Jones in 2005. (Doc. 1, ¶ 4). ABC claims it was at this time that Smith contacted ABC to create a partnership between Smith and ABC.

Under this partnership, Smith would, "through one of his entities," secure certain distribution and marketing rights for Plaintiff in the People's Republic of China for ABC's medical devices. (Doc. 32-1, ¶ 31). Plaintiff then alleges in the Complaint that Defendants Smith and Jones used their partnership with ABC to acquire ABC's proprietary information, and that Smith and Jones then provided that information to another company they controlled, Defendant Beijing Medical Co. Ltd., *d/b/a* MedCo ("MedCo"). (Doc. 1, ¶ 4).

Plaintiff ABC and non-defendant MedTech entered into a Distribution Agreement in 2016, in which MedTech was to facilitate the sale of ABC products in the People's Republic of China. (Doc. 1, ¶ 2). Under the Distribution Agreement, MedTech's responsibilities included securing regulatory approvals in China for Plaintiff's medical products and acting as exclusive distributor for certain ABC products in the People's Republic of China. (Doc. 1, ¶ 20-23). Plaintiff claims that Defendants Smith and Jones used their roles as partners with ABC, beginning over a decade before but including this Distribution Agreement, to acquire confidential intellectual property. Plaintiff's further allege Defendants Smith and Jones then provided that information to Defendant MedCo. (Doc. 1, ¶ 39).

Plaintiff claims Defendants have created facially identical "knock-off" versions of Plaintiff's medical products, for which Defendants have begun filing patent approval and licensing documents in order to compete with Plaintiff in China. (Doc. 1, ¶ 38-40). Plaintiff also claims that pursuant to the Distribution Agreement with non-defendant MedTech, ABC has sent and MedTech has received ABC inventory for which MedTech owes ABC $1,104,937.20 USD. (Doc. 1, ¶ 28). MedTech has not paid nor returned the inventory

following several demands by ABC. (Doc. 1, ¶ 30). ABC's products have still not received regulatory approval in China. (Doc. 1, ¶ 44).

Defendant Smith has visited ABC's facilities in Ohio twice, each time for one day, in order to further ABC's relationship with MedTech in China. (Doc. 32, PageID # 285, referencing Doc. 22-1, PageID #199). Plaintiff and Defendant Smith have engaged in many telecommunications and emails regarding MedTech's duties under the Distribution Agreement. (Doc. 32, PageID 285). Plaintiff does not allege that Smith or any other officer of MedCo has traveled to Ohio in connection with his business with MedCo.

## II. ANALYSIS

### A. Standard of Review

Federal Rule of Civil Procedure 12(b)(2) provides that a defendant may seek dismissal if the court lacks personal jurisdiction over that defendant. "The party seeking to assert personal jurisdiction bears the burden of demonstrating that such jurisdiction exists." *Schneider v. Hardesty*, 669 F.3d 693, 697 (6th Cir. 2012) (quoting *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002)). In the face of a supported motion to dismiss, the plaintiff may not rest on his pleadings, but must, by affidavit or otherwise, set forth specific evidence supporting jurisdiction. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) (citing *Weller v. Cromwell Oil Co*., 504 F.2d 927, 930 (6th Cir. 1974)). When a court considers a motion to dismiss pursuant to Rule 12(b)(2) without an evidentiary hearing, as this Court does here, the plaintiff "'need only make a *prima facie* showing of jurisdiction.'" *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002) (quoting *Neogen*, 282 F.3d at 887) (internal citation omitted).

Plaintiff can make a *prima facie* showing of personal jurisdiction by "establishing with reasonable particularity sufficient contacts between [Defendants] and the forum state to support jurisdiction.'" *Neogen Corp. v. Neo Gen Screening, Inc.,* 282 F.3d 883, 887 (6th Cir. 2002) (*quoting Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987)). Plaintiff's burden here is "relatively slight." *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

**B. Waiving Personal Jurisdiction**

Plaintiff claims Defendants have waived personal jurisdiction by entering a general appearance with the court in order to file a motion and to appear *pro hac vice*. Plaintiff's waiver argument relies entirely on a previous Sixth Circuit decision stating that "[d]efendants' filing of a general appearance with the district court constitute[s] a voluntary acceptance of the district court's jurisdiction, and therefore, a waiver of [d]efendants' personal jurisdiction defense." *Gerber v. Riordan*, 649 F.3d 514, 520 (6th Cir. 2011). However, the Sixth Circuit has clarified that the *Gerber* test asks "whether a defendant's conduct prior to raising the defense has given the plaintiff 'a reasonable expectation' that the defendant will defend the suit on the merits or whether the defendant has caused the court to 'go to some effort that would be wasted if personal jurisdiction is later found lacking.'" *King v. Taylor*, 694 F.3d 650, 659 (6th Cir. 2012). The defendant in *King* had participated extensively in court proceedings, including voluntarily participating in full discovery on the merits, attending a status conference, and more. *Id.*

Unlike the defendants in *King* or *Gerber*, the Defendants in the case at bar have given no indication they intend to defend this case on its merits. The only filings Defendants have made with the court are extensions for time, *pro hac vice* filings, and

this motion to dismiss with supporting motions and affidavits. (Docs. 12, 15, 16, 19, 21, 22, 33). In fact, Defendants filed a Notice to the Court of their declination to comply with discovery requests and conferences specifically to protect their personal jurisdiction defense. (Doc. 24). None of these entries addressed the merits of the case or argued any issues other than jurisdiction. As a result, this case is more readily compared to *Lucas v. Desilva Automotive Services, et al.*, 2019 WL 1440458 (2019), in which this Court upheld a magistrate judge's finding that since *Gerber*, courts in the Sixth Circuit have rejected a broad interpretation of *Gerber*'s waiver test. The Defendants have not provided this Court nor the Plaintiff any expectation other than that they are contesting personal jurisdiction as a threshold matter. *See Lucas v. Desilva Automotive Services, et al.*, No. 1:16-cv-790-MRB-SKB at 21-22. Plaintiff has provided no case law distinguishing these post-*Gerber* decisions.

## III. PERSONAL JURISDICTION

The Sixth Circuit has explained that there are two kinds of personal jurisdiction: general and specific jurisdiction. *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996) (Jurisdiction may be found to exist either generally, in cases in which a defendant's continuous and systematic conduct within the forum state renders that defendant amenable to suit in any lawsuit brought against it in the forum state . . . or specifically, in cases in which the subject matter of the lawsuit arises out of or is related to the defendant's contacts with the forum.). Plaintiff has put forth no evidence that Defendants are "essentially at home in the forum state," so the Court turns its attention to specific jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quoting *Goodyear*, 564 U.S. 915, 919 (2011)).

A court may only exercise personal jurisdiction if they determine the case meets 1) the requirements of the state's long arm statute and 2) the requirements of constitutional due process. *Calphalon v. Rowlette*, 228 F.3d 718, 721 (6th Cir. 2000); *Air Prods. & Controls*, 503 F.3d at 550.

**A. Ohio Long-Arm Statute**

The Sixth Circuit has stated that under Ohio law, a court may exercise personal jurisdiction over a non-resident defendant only if specific jurisdiction can be found under one of the enumerated bases in Ohio's long-arm statute. *Conn v. Zakharov,* 667 F.3d 705, 717 (6th Cir. 2012).

Ohio's long-arm statute provides in relevant part that:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> . . .
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

Ohio Rev. Code § 2307.382(A). The Ohio Supreme Court has explained that the Atransacting any business' basis for extending jurisdiction set forth in Ohio Revised Code ' 2307.382(A)(1), Ais very broadly worded and permit[s] jurisdiction over nonresident defendants who are transacting any business in Ohio. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc*., 559 N.E.2d 477, 481 (Ohio 1990); *see also Brunner v. Hampson*, 441 F.3d 457, 464 (6th Cir. 2006) ("The term 'transacting any business' as

used in . . . the statute . . . will be given broad interpretation.'") (quoting *Ricker v. Fraza/Forklifts of Detroit*, 828 N.E.2d 205, 209 (Ohio Ct. App. 2005)).

The Sixth Circuit has held that the "transacting any business" prong of Ohio's long-arm statute is co-extensive with the purposeful availment prong of Constitutional Due Process, so there exists some overlap in analysis. *Ashwood Computer Co. v. Bluegrass Area Dev. Dist.*, 2016 WL 1028263 at *17 (see *Dayton Superior Corp. v. Yan*, 288 F.R.D. 151, 164 (S.D. Ohio 2012) (citing *Burnshire Dev., LLC v. Cliffs Reduced Iron Corp.*, 198 F. App'x 425, 429 (6th Cir. 2006)). This Court has previously noted "mere solicitation of business does not constitute transacting business in Ohio for purposes of establishing jurisdiction under Section 2307.382(A)(1)." *Mobile Conversions, Inc. v. Allegheny Ford Truck Sales*, No. 1:12cv369, 2012 WL 12893476, at *2 (S.D. Ohio Oct. 15, 2012). However, the Sixth Circuit's broad interpretation of "transacting business" allows for broader jurisdiction over business relationships than exclusively contractual. Defendant Smith's self-described "partnership" with ABC is undeniably more than "mere solicitation of business." (Docs. 1 & 32-1).

Defendant's actions are analogous to those of the defendants in *Kendle v. Whig Enterprises, LLC*, 2016 WL 5661680 (S.D. Ohio 2016). At all times in *Kendle*, the defendants referred to the plaintiff as their business "partner", and their relationship was based on defendants' intent to expand the plaintiff's medical sales business "regardless of which specific corporate entity might be involved." *Id.* at *3. Similarly, ABC alleges that Defendant Smith contacted ABC to develop a partnership "through one of his entities" beginning in 2005, more than a decade before the MEDTECH Distribution Agreement. (Doc. 32-1, ¶ 31). Defendant Smith contracted with ABC through various entities

throughout their decades-long partnership. As in *Kendle*, Defendants knew Plaintiff was located in Ohio and "frequently called, emailed, and texted Plaintiff in Ohio related to a variety of business transactions." *Id.* at *4. Plaintiff has made a *prima face* showing that Defendants "transacted any business" under Section (A)(1) of Ohio's long-arm statute.

Defendant Smith claims that at all times he was operating as a corporate agent for MedTech, and therefore cannot be personally liable in Ohio. As a result, the Court must determine whether the fiduciary shield doctrine precludes the Court from exercising jurisdiction over Defendants. The fiduciary shield doctrine "provides that corporate employees performing acts in their corporate capacity are not subject to the personal jurisdiction of a court for such acts." *Heritage Funding & Leasing Co. v. Phee*, 120 Ohio App.3d 422, 430, 698 N.E.2d 67 (10th Dist. 1997). However, the corporate shield doctrine does not protect agents that commit intentional torts, an exception separate from the alter-ego doctrine. *See Maui Toys v. Brown*, 2014 WL 644699.

The Sixth Circuit has held that a Court may exercise jurisdiction over an out-of-state officer when that officer "is actively and personally involved in the conduct giving rise to the claim." *Flynn v. Greg Anthony Constr. Co.*, 95 Fed.Appx. 726, 740 (6th Cir. 2003) (quoting *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 698 (6th Cir. 2000)). To determine this, "the exercise of personal jurisdiction should depend on traditional notions of fair play and substantial justice; *i.e.*, whether she purposely availed herself of the forum and the reasonably foreseeable consequences of that availment." *Id.* As previously discussed, the "transacting any business prong" of Ohio's long-arm statute is co-extensive with the purposeful availment prong of constitutional due process. Plaintiff has sufficiently alleged that Defendants Smith and Jones as *individuals* availed

themselves of Ohio law using, in part, Defendant MedCo. Therefore, though the MedTech Distribution Agreement itself is subject to arbitration in China, the torts alleged against Defendants Smith and Jones personally and in connection with Defendant MedCo may be heard under Ohio's long-arm statute. Plaintiff has sufficiently alleged facts fulfilling Ohio's long-arm statute, so the Court may move to the constitutional due process portion of the jurisdictional analysis.

**B. CONSTITUTIONAL DUE PROCESS**

The Sixth Circuit has a three-part test for determining whether due process permits the exercise of personal jurisdiction over a defendant:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

*Miller v. AXA Winterthur Ins. Co*., 694 F.3d 675, 680 (6th Cir. 2012) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)).

**1. Purposeful Availment**

"Due process requires that a defendant be hailed into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden v. Fiore*, 571 U.S. 277, 134 S.Ct. 1115, 1123, 188 L.Ed.2d 12 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

This Court finds that Plaintiff has set forth a *prima facie* case that Defendants have purposefully availed themselves of the privilege of conducting business within Ohio. Defendants argue that there is no purposeful availment because they did not conduct any

business in Ohio in their personal capacity and because their contacts with Ohio are fortuitous. (Doc. 33, p. 8). However, Plaintiff has at least set forth a *prima facie* showing that the Defendants have purposefully availed themselves of the forum by creating a continuing obligation in Ohio. *See Cole v. Mileti,* 122 F.3d 433 (6th Cir. 1998). While Defendant's reading of *Calphalon* certainly limits the role that a contract alone can play in purposeful availment, Defendants' relationship with Plaintiff in Ohio extends beyond the MedTech Distribution Agreement.

Several of Plaintiff's claimed contacts by ABC are far too attenuated to meet the "minimum contacts" standard of purposeful availment. Defendant MedCo's Minnesotan agent is not a contact with Ohio, nor are their applications for patents sent to California. (*See* Doc. 32, p. 3). However, the Plaintiff alleges other facts that constitute a *prima facie* showing of purposeful availment. As previously noted, the "transacting business" prong of Ohio's long-arm statute is co-extensive with the purposeful availment standard of constitutional due process. Defendant Smith solicited ABC, an Ohio resident, to engage in an ongoing business relationship while based in Ohio. Defendant Smith utilized multiple entities to facilitate this partnership throughout the relationship. (Doc. 32, p. 4). Defendants called and emailed Plaintiff, knowing they were located in Ohio, for the purposes of receiving Ohio-made medical devices in China. The same contacts made by Defendants to ABC in furtherance of their "partnership" satisfy the purposeful availment standard.

**2. <u>Arising Out Of</u>**

The second prong of The Sixth Circuit's constitutional due process standard requires the Plaintiff's cause of action to arise out of the Defendant's contacts with the

state. *Miller v. AXA Winterthur Ins. Co*., 694 F.3d 675, 680 (6th Cir. 2012) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). The torts Defendant is alleged to have committed indeed arise out of the ongoing business relationship contacts between Defendants and Plaintiff. Plaintiff has made a *prima facie* showing of the second prong of the due process analysis.

**3. Reasonableness of Jurisdiction**

The Court finds that jurisdiction over Defendants in Ohio is reasonable based in part on the length and depth of their business relationship. "[A]ccording to Sixth Circuit precedent, 'where the first two criteria are satisfied, only the unusual case will not meet this third criterion.'" *Int'l Paper Co. v. Goldschmidt*, 872 F.Supp. 2d 624, 633 (S.D. Ohio 2012) (quoting *Aristech Chem. Int'l Ltd. V. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6th Cir. 1998) (citations omitted)). The three factors the Court must balance when determining reasonability are as follows: "the burden on the defendant, the interests of the forum [s]tate, and the plaintiff's interest in obtaining relief.'" *City of Monroe Emp. Ret. Sys. V. Bridgestone*, 399 F.3d 651, 666 (6th Cir. 2005) (quoting *Asahi*, 480 U.S. at 113)).

Though Defendant claims traveling from China would impose a greater burden on the defendant than justice allows, the Court does not find this to be true. Ohio has a great interest in ensuring that foreign businesses who transact with Ohio companies do so fairly and legally. Intellectual property is particularly vulnerable when business is conducted on a global scale, and Plaintiff has an interest in pursuing relief for alleged damages resulting from Defendants choice to transact with them. While Defendant Smith's trips to the United States do not serve as contacts to suffice the purposeful availment prong of the due

process analysis, they do provide evidence on the Plaintiff's behalf that travel to the United States is not unduly burdensome on this Defendant.

Defendants fail to allege facts that the exercise of jurisdiction in Ohio would impose an unreasonable burden on them. Thus, both the Ohio long-arm statute and the Due Process Clause are satisfied. Personal jurisdiction is proper over Defendants for the torts alleged.

## IV. ***Forum Non Conveniens***

"*Forum non conveniens* is a common law doctrine that allows a district court not to exercise its jurisdiction." *Jones v. IPX Int'l Equatorial Guinea, S.A.*, 920 F.3d 1085, 1090 (6th Cir. 2019). A *forum non conveniens* analysis requires three considerations: "(1) whether an adequate alternative forum is available; (2) whether a balance of private and public interests suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court; and (3) the amount of deference to give the plaintiff's choice of forum." *Id.* The moving party bears "the burden of establishing the need for a transfer of venue." *Kay,* 494 F. Supp. 2d at 849 (citing *Jambour v. Scottsdale Ins. Co.*, 211 F. Supp. 2d 941, 945 (S.D. Ohio 2002)).

### 1. Adequate Alternative

Plaintiff argues that the People's Republic of China is not an adequate alternative forum for a number of reasons. Plaintiff claims that Chinese courts are subject to "improper influence, as they do not enjoy judicial independence and instead are subject to the whims of the Chinese government, individuals above them in their hierarchical system, or an individual's social and professional ties." (Doc. 32, p. 18). Defendants refute these claims outright. (Doc. 33, p. 19). Defendants do not directly refute Plaintiff's claim

that China "provides no legitimate, enforceable avenue for injunctive relief as this Court does." (Doc. 32, p. 18). Injunctive relief is an important protection for plaintiffs in intellectual property cases, and the lack of such relief is one factor indicating the People's Republic of China is not an adequate alternative forum.

**2. Private and Public Interests**

Defendants argue that private interests weigh against litigation in Ohio, claiming the expense of flying witnesses and evidence from the People's Republic of China to Ohio would be unduly burdensome upon Defendants. (Doc. 33, p. 18). They claim that ABC, on the other hand would be able to easily access its electronic files from its Chinese offices. (Doc. 33, p. 18). Plaintiff counters that ABC would face the same burdens of expense by litigating in the People's Republic of China. "For example, all of ABC's research, development, manufacturing, and most of its employees are here in Ohio." (Doc. 32, p. 19). To this end, Plaintiff maintains that though they do have offices in the People's Republic of China, the evidence that would be the subject of this litigation (i.e., intellectual property, trade secrets, and the medical devices themselves) are instead located in their Ohio offices. The Defendants fail to allege that private and public interests weigh more heavily in their favor than Plaintiff's.

**3. Weighing Plaintiff's Choice of Forum**

Finally, the Court must determine what weight to provide Plaintiff's choice of forum. Defendants cite this Court's decision in *Breech v. Liberty Mut. Ins. Co.*, 2015 U.S. Dist. LEXIS 37870 to indicate that less deference should be given to a Plaintiff's choice of forum where the cause of action has little to no connection with the forum state. Unlike the case at bar, neither the Plaintiff nor Defendant in *Breech* were at home in the Western

Division of the United States District Court for the Southern District of Ohio. *Id.* at *5. Moreover, the motion in *Breech* was not for a *forum non conveniens* dismissal but for a division transfer to the Eastern Division of the United States District Court for the Southern District of Ohio. This Court acknowledged that neither Plaintiff resided in the Western Division, and that the Plaintiff could have also validly brought the case in the Eastern Division.

Unlike the Plaintiff in *Breech*, ABC is at home in the Western Division of the United States District Court for the Southern District of Ohio. Moreover, to say this case has "little connection with the chosen forum" would not be true. As recognized above, Plaintiff's intellectual property and trade secrets are located in their Ohio offices. Defendants' visits to the Ohio offices are alleged to be one avenue by which Defendant acquired the trade secrets in question. The cause of action arises in some capacity out of Plaintiff's connection with the Southern District of Ohio. Defendant has not met their burden to overcome the deference provided to Plaintiff's choice of their home forum.

Because the Court finds that jurisdiction is proper in the Southern District of Ohio and litigation in this district is not unduly burdensome on the Defendant, the Court denies Defendants' plea for dismissal under *forum non conveniens*.

## V. CONCLUSION

Based on the Court's findings described above, Defendants' Motion to Dismiss (Doc. 21) is **DENIED**.

## Applicant Details

| | |
|---|---|
| First Name | **Haley** |
| Last Name | **Kiser** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **hkiser@email.sc.edu** |
| Address | **Address**<br>Street<br>**1028 Pope St**<br>City<br>**Columbia**<br>State/Territory<br>**South Carolina**<br>Zip<br>**29201**<br>Country<br>**United States** |
| Contact Phone Number | **8706880227** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Arkansas Tech University** |
| Date of BA/BS | **May 2012** |
| JD/LLB From | **University of South Carolina School of Law**<br>**http://www.law.sc.edu** |
| Date of JD/LLB | **May 6, 2022** |
| Class Rank | **50%** |
| Law Review/Journal | **Yes** |
| Journal(s) | **ABA Real Property, Trust & Estate Law Journal** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |

Post-graduate Judicial Law Clerk **No**

## Specialized Work Experience

## Professional Organization

Organizations **Just The Beginning Foundation**

## References

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

# Haley Kiser

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June 28, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year law student at the University of South Carolina School of Law pursuing the Children's Law Concentration, and I am writing to apply for a term law clerk position with your chambers. I was fortunate enough to have been accepted as a participant this summer in South Carolina's Judicial Observation Experience Program where I was able to spend two weeks in a judge's chambers on the South Carolina Court of Appeals and participate as a law clerk. I was able to work collaboratively with chambers to discuss upcoming oral arguments and learn their researching and drafting process for bench memorandums.

During my time in law school, I have been able to strengthen my research and writing skills. As a rising 2L I participated in the Joint Journal Writing Competition and was invited onto the ABA Real Property, Trust & Estate Law Journal as a member of the Editorial Staff. As a member, I was responsible for spading and editing articles scheduled to be published and received a Golden Spade Award for best editing on one of the articles. This fall, I will continue to be involved in the Journal as a Research Editor. Last summer, I worked as a law clerk for the Michigan Poverty Law Program focusing on the areas of family and housing law. During my time with MPLP, I helped draft an amicus curiae brief to the Michigan Supreme Court. This summer, I am working at a local law firm gaining experience in drafting orders and pleadings, drafting and responding to discovery requests, and researching and producing memorandums on relevant issues in the areas of family law, civil litigation, employment law, and corporate law.

I also possess strong teamwork, leadership, and collaborative skills. Last fall, I was admitted to the Mock Trial Bar at U of SC Law. I was selected to represent our school in a national competition, and I was since elected Chief Justice of the Bar. I have also become heavily involved in U of SC Law's Pro Bono Program. I became a volunteer Guardian ad Litem for Richland County Court Appointed Special Advocates for Children and a Volunteer Income Tax Assistance Team Member. Last semester, I was invited onto the Pro Bono Program Board for my commitment to the program and into the Phi Delta Phi Legal Honor Society.

Thank you for your time and consideration of my application. I would welcome the opportunity to work in your chambers as a law clerk. Please let me know if you have any additional questions for me. Please expect my letters of recommendation under separate cover. I look forward to hearing from you.

Sincerely,

Haley Kiser

# Haley Kiser

hkiser@email.sc.edu | 870.688.0227 | 1028 Pope St., Columbia, SC 29201

## EDUCATION

**University of South Carolina School of Law,** GPA 3.286 — May 2022
Candidate for Juris Doctor, Children's Law Concentration
Activities: CASA Guardian Ad Litem; Mock Trial Bar – Chief Justice; ABA Real Property, Trust and Estate Law Journal – Research Editor; Pro Bono – Board Member & VITA Team; Phi Delta Phi Legal Honor Society Member

**University of Michigan School of Social Work,** GPA 4.0 — April 2019
Master of Social Work, Child Welfare Certificate
Community Organization Concentration, Children & Youth in Families Focus, Interpersonal Practice Minor
Activities: Child Welfare Student Association - Project Coordinator; Community Technical Assistance Collaborative

**Arkansas Tech University,** GPA 3.448 — May 2012
B.A. in Spanish, B.A. in Psychology, A.S. in Criminal Justice

## EXPERIENCE

**Morton & Gettys, LLC,** Rock Hill, SC — May 2021 - August 2021
*Summer Law Clerk*
Research issues in various areas of law including family, criminal, and estate law. Draft motions, deeds, and contract/agreement amendments. Attend jury trials and mediations. Assist in producing discovery responses.

**Judicial Observation Experience Program,** Columbia, SC — May 2021
*Participant, South Carolina Court of Appeals, The Honorable Blake Hewitt*
Reviewed briefs and observed oral arguments. Conducted research and drafted a bench memorandum on a post-conviction relief matter before the Court. Participated in case debriefs with Judge Hewitt and his current law clerks.

**SC Department of Children's Advocacy,** Columbia, SC — January 2021 - April 2021
*Investigation's Unit Legal Extern*
Created tool to track relevant proposed legislation. Updated critical incident logs to automatically calculate data. Participated in Foster Care Review Board hearings and the Governor's Juvenile Justice Advisory Council Meetings.

**Michigan Poverty Law Program,** Ypsilanti, MI — May 2020 - August 2020
*Summer Law Clerk - Family & Housing Law*
Assisted in drafting an amicus brief to the Michigan Supreme Court regarding ethical concerns/duties for mediators in domestic violence cases. Advocated for allocation of CARES Act funds to low-income rental assistance.

**Washtenaw Area Council for Children,** Ypsilanti, MI — September 2018 - April 2019
*Cyber Safety Program Intern*
Developed and facilitated Cyber Safety Workshop at local area schools which involved presentations and student collaboration. Led a peer mentor group at a local school to promote Cyber Safety and an anti-bullying culture.

**Michigan's State Appellate Defender Office,** Detroit, MI — September 2017 - April 2018
*The Re-entry Project Program Intern*
Researched and compiled potential community resources to create re-entry plans for juvenile offenders re-entering society after confinement. Planned and coordinated life skills workshops for returned citizens.

**Dependency/Neglect Attorney Ad Litem Program,** Little Rock, AR — June 2017 - August 2017
*Program Intern*
Developed and facilitated Advocacy 101 training for approximately 30 current AALs and CASA personnel.

**City Year AmeriCorps Member,** Little Rock, AR — July 2015 - May 2017
*AmeriCorps Member, Team Leader*
Trained and supported seven first-year corps members in academic interventions, event planning, and other duties.

**Arkansas State Police Crimes Against Children Division,** Sheridan, AR — October 2013 - July 2015
*Child Abuse Investigator*
Trainings Received: ChildFirst Forensic Interview Training and The Reid Technique of Interview and Interrogation

## VOLUNTEER EXPERIENCE

**Community Technical Assistance Collaborative,** Ann Arbor, MI — January 2019 - April 2019
**Ozone House, Crisis Line Volunteer,** Ann Arbor, MI — February 2018 - April 2019
**Big Brother Big Sisters, Mentor,** Little Rock, AR — October 2014 - August 2017

# Haley Kiser

hkiser@email.sc.edu | 870.688.0227 | 1028 Pope St., Columbia, SC 29201


# Grade Report

Cumulative GPA: 3.286
Class Rank: 101/220 Top 50%

Fall 2019

| COURSE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Torts | Black | B | 4 |
| Contract Law | McWilliams | B+ | 4 |
| Criminal Law | Kuo | B | 3 |
| Legal Research, Analysis, & Writing I | Leonardi/Brackmann | B | 3 |
| Introduction to the Legal Profession | Wilcox | Pass | 1 |

Semester GPA: 3.143

Spring 2020

| COURSE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Property | Snow | Pass | 4 |
| Civil Procedure | Eichhorn | Pass | 4 |
| Constitutional Law | Crocker | Pass | 4 |
| Legal Research, Analysis, & Writing II | Leonardi/Brackmann | Pass | 3 |

All classes during this semester were graded on pass/fail basis due to COVID-19.

Fall 2020

| COURSE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Evidence | Anderson | B+ | 3 |
| Income Taxation | Davis | B | 3 |
| Family Law | Zug | B | 3 |
| Wills, Trusts, and Estates | Medlin | B | 3 |
| Caretaking, Family & the Law | Suski | B+ | 3 |

Semester GPA: 3.200

Spring 2021

| COURSE | PROFESSOR | GRADE | CREDITS |
|---|---|---|---|
| Trial Advocacy | Bayne | Pass | 2 |
| Business Associations | Means | B | 3 |
| Administrative Law Externship | Nye | A | 2 |
| Problems in Professional Responsibility | Markovic | A | 3 |
| Criminal Procedure | Said | B | 3 |
| Children and the Courts | Bodman | A | 2 |

Semester GPA: 3.538
Dean's Honor List

# ARKANSAS TECH UNIVERSITY



**Record of:** Haley Michelle Kiser
**Current Name:** Haley Michelle Kiser

Issued To: Haley Kiser
Parchment DocumentID: 34170869

**Date Issued:** 13-MAY-2021
**Date of Birth:** 20-AUG-1990
**Student ID:** T01014752
**Level:** Undergraduate



Course Level: Undergraduate

Current Program
Associate of Science
Program : AS Criminal Justice
College : Arts and Humanities
Campus : Main
Major: Criminal Justice

Secondary
Bachelor of Arts
Program : BA Spanish
College : Arts and Humanities
Campus : Main
Major: World Lang Span Concentration
Bachelor of Arts
Program : BA Psychology
College : Arts and Humanities
Campus : Main
Major: Psychology

Degrees Awarded Associate of Science 06-JUL-2012
Primary Degree
Program : AS Criminal Justice
College : Arts and Humanities
Campus : Main
Continued Criminal Justice

Degrees Awarded Bachelor of Arts 06-JUL-2012
Primary Degree
Program : BA Psychology
College : Arts and Humanities
Campus : Main
Continued Psychology

Degrees Awarded Bachelor of Arts 06-JUL-2012
Primary Degree
Program : BA Spanish
College : Arts and Humanities
Campus : Main
Continued World Lang Span Concentration
********** CONTINUED ON NEXT COLUMN **********

| SUBJ | NO. | COURSE TITLE | CRED | GRD | R PTS |
|---|---|---|---|---|---|
| TRANSFER CREDIT ACCEPTED BY THE INSTITUTION: | | | | | |
| 007 FALL North Arkansas College | | | | | |
| ENGL | 1013 | COMPOSITION I | 3.000 | TB | |
| MATH | 1113 | COLLEGE ALGEBRA | 3.000 | TB | |
| | Ehrs: | 6.000 QPts: | 0.000 | | |
| | GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| 008 | North Arkansas College | | | | |
| PRING | | | | | |
| ENGL | 1023 | COMPOSITION II | 3.000 | TB | |
| GEMA | 2XXX | FINITE MATHEMATICS (GEN ED) | 3.000 | TA | |
| | Ehrs: | 6.000 QPts: | 0.000 | | |
| | GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| 01040 | North Arkansas College | | | | |
| HIST | 2013 | UNITED STATES HISTORY II | 3.000 | TA | |
| | Ehrs: | 3.000 QPts: | 0.000 | | |
| | GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| 008 Fall Credit by Institutional Exam | | | | | |
| SPAN | 1014 | BEGINNING SPANISH I | 4.000 | CE | |
| SPAN | 1024 | BEGINNING SPANISH II | 4.000 | CE | |
| | Ehrs: | 8.000 QPts: | 0.000 | | |
| | GPA-Hrs: | 0.000 GPA: | 0.000 | | |
| INSTITUTION CREDIT: | | | | | |
| Fall Term 2008 | | | | | |
| CSP | 1013 | PRIN OF COLLEGE SUCCESS | 3.000 | A | 12.000 |
| ENGL | 2173 | INTRO TO FILM | 3.000 | A | 12.000 |
| PHSC | 1051 | OBSERVATIO/ASTRONOMY LAB | 1.000 | A | 4.000 |

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Tammy Weaver

Tammy Weaver, Registrar

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# ARKANSAS TECH UNIVERSITY



**Record of:** Haley Michelle Kiser
**Current Name:** Haley Michelle Kiser

**Date Issued:** 13-MAY-2021
**Date of Birth:** 20-AUG-1990
**Student ID:** T01014752
**Level:** Undergraduate

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| Institution Information continued: | | | | | | |
| PHSC | 1053 | ASTRONOMY | 3.000 | C | 6.00 | |
| PSY | 2003 | GENERAL PSYCHOLOGY | 3.000 | B | 9.00 | |
| SPAN | 2014 | INTERMEDIATE SPAN I | 4.000 | A | 16.00 | |
| | Ehrs: | 17.000 QPts: | 59.000 | | | |
| | GPA-Hrs: | 17.000 GPA: | 3.471 | | | |
| Spring Term 2009 | | | | | | |
| BIOL | 2004 | BASIC HUMAN ANAT/PHYSIOL | 4.000 | D | .00 | E |
| HIST | 1513 | WORLD CIVILIZATION II | 3.000 | D | .00 | E |
| PHIL | 2003 | INTRO TO PHILOSOPHY | 3.000 | C | 6.00 | |
| SOC | 1003 | INTRODUCTORY SOCIOLOGY | 3.000 | B | 9.00 | |
| SPAN | 2024 | INTERMEDIATE SPAN II | 4.000 | A | 16.00 | |
| | Ehrs: | 10.000 QPts: | 31.000 | | | |
| | GPA-Hrs: | 10.000 GPA: | 3.100 | | | |
| Fall Term 2009 | | | | | | |
| BIOL | 1014 | INTRO/BIOLOGICAL SCIENCE | 4.000 | B | 12.00 | |
| POLS | 2003 | AMERICAN GOVERNMENT | 3.000 | B | 9.00 | |
| PSY | 2053 | STATISTICS/BEHAV SCI | 3.000 | B | 9.00 | |
| SPAN | 3003 | CONVERSATION/COMP I | 3.000 | A | 12.00 | |
| SPAN | 3023 | INTRO TO LINGUISTICS | 3.000 | B | 9.00 | |
| WS | 1002 | PHYS WELLNESS/FITNESS | 2.000 | A | 8.00 | |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| Institution Information continued: | | | | | | |
| | Ehrs: | 18.000 QPts: | 59.000 | | | |
| | GPA-Hrs: | 18.000 GPA: | 3.278 | | | |
| Spring Term 2010 | | | | | | |
| ANTH | 2003 | CULTURAL ANTHROPOLOGY | 3.000 | B | 9.000 | |
| CJ | 2003 | INTRO/CRIMINAL JUSTICE | 3.000 | A | 12.000 | |
| ENGL | 2003 | INTRO/WORLD LITERATURE | 3.000 | D | .000 | E |
| PSY | 2074 | EXPERIMENTAL PSYCHOLOGY | 4.000 | A | 16.000 | |
| SPAN | 3013 | CONVERSATION/COMP II | 3.000 | B | 9.000 | |
| | Ehrs: | 13.000 QPts: | 46.000 | | | |
| | GPA-Hrs: | 13.000 GPA: | 3.538 | | | |
| Summer II Term 2010 | | | | | | |
| PSY | 3063 | DEVELOPMENTAL PSY I | 3.000 | A | 12.000 | |
| | Ehrs: | 3.000 QPts: | 12.000 | | | |
| | GPA-Hrs: | 3.000 GPA: | 4.000 | | | |
| Fall Term 2010 | | | | | | |
| CJ | 2033 | SOCIAL PROBLEMS | 3.000 | A | 12.000 | |
| CJ | 3033 | THE CRIMINAL MIND | 3.000 | A | 12.000 | |
| PSY | 2093 | HUMAN SEXUALITY | 3.000 | A | 12.000 | |
| PSY | 3003 | ABNORMAL PSYCHOLOGY | 3.000 | A | 12.000 | |
| SPAN | 3133 | SPAN-AMER CIV/CULTURE | 3.000 | B | 9.000 | |
| SPAN | 3213 | ADVANCED GRAMMAR/USAGE | 3.000 | B | 9.000 | |

********** CONTINUED ON PAGE 3 **********

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Tammy Weaver

Tammy Weaver, Registrar

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# ARKANSAS TECH UNIVERSITY



**Record of:** Haley Michelle Kiser
**Current Name:** Haley Michelle Kiser

**Date Issued:** 13-MAY-2021
**Date of Birth:** 20-AUG-1990
**Student ID:** T01014752
**Level:** Undergraduate

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| Institution Information continued: | | | | | | |
| | Ehrs: | 18.000 QPts: | 66.000 | | | |
| | GPA-Hrs: | 18.000 GPA: | 3.667 | | | |
| Dean's List | | | | | | |
| Spring Term 2011 | | | | | | |
| CJ | 2043 | CRIME AND DELINQUENCY | 3.000 | A | 12.00 | |
| PSY | 3133 | SELF AND SOCIETY | 3.000 | A | 12.00 | |
| PSY | 4043 | SOCIAL PSYCHOLOGY | 3.000 | B | 9.00 | |
| SOC | 3023 | THE FAMILY | 3.000 | A | 12.00 | |
| SPAN | 3223 | SHORT STORY | 3.000 | B | 9.00 | |
| SPAN | 4023 | INTRO TO SPANISH LINGUISTICS | 3.000 | B | 9.00 | |
| | Ehrs: | 18.000 QPts: | 63.000 | | | |
| | GPA-Hrs: | 18.000 GPA: | 3.500 | | | |
| Dean's List | | | | | | |
| Summer II Term 2011 | | | | | | |
| SPAN | 3143 | STUDY ABROAD | 3.000 | A | 12.00 | |
| SPAN | 4993 | SP: SPANISH LITERATUE | 3.000 | A | 12.00 | |
| | Ehrs: | 6.000 QPts: | 24.000 | | | |
| | GPA-Hrs: | 6.000 GPA: | 4.000 | | | |
| Fall Term 2011 | | | | | | |
| BIOL | 2004 | BASIC HUMAN ANAT/PHYSIOL | 4.000 | B | 12.00 | I |
| CJ | 3103 | JUVENILE JUSTICE SYSTEM | 3.000 | A | 12.00 | |
| PSY | 3073 | PSYCHOLOGY OF LEARNING | 3.000 | B | 9.00 | |
| SOC | 4023 | SOCIOLOGY OF GENDER | 3.000 | A | 12.00 | |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| Institution Information continued: | | | | | | |
| SPAN | 4003 | ORAL COMMUNICATIONS | 3.000 | B | 9.000 | |
| | Ehrs: | 16.000 QPts: | 54.000 | | | |
| | GPA-Hrs: | 16.000 GPA: | 3.375 | | | |
| Spring Term 2012 | | | | | | |
| ENGL | 2003 | INTRO/WORLD LITERATURE | 3.000 | B | 9.000 | I |
| HIST | 1513 | WORLD CIVILIZATION II | 3.000 | B | 9.000 | I |
| POLS | 3023 | JUDICIAL PROCESS | 3.000 | B | 9.000 | |
| PSY | 4993 | SP: CASA FIELD PLACEMENT | 3.000 | A | 12.000 | |
| SPAN | 4223 | SPANISH-AMERICAN LIT | 3.000 | B | 9.000 | |
| | Ehrs: | 15.000 QPts: | 48.000 | | | |
| | GPA-Hrs: | 15.000 GPA: | 3.200 | | | |

********** TRANSCRIPT TOTALS **********

| | | | | |
|---|---|---|---|---|
| INSTITUTION | Ehrs: | 134.000 QPts: | 462.000 | |
| | GPA-Hrs: | 134.000 GPA: | 3.448 | |
| TRANSFER | Ehrs: | 23.000 QPts: | 0.000 | |
| | GPA-Hrs: | 0.000 GPA: | 0.000 | |
| OVERALL | Ehrs: | 157.000 QPts: | 462.000 | |
| | GPA-Hrs: | 134.000 GPA: | 3.448 | |

********** END OF TRANSCRIPT **********

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# Arkansas Tech University

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School Code 001089 • (479) 968-0272 • www.atu.edu/registrar



**ACCREDITATION:**
Arkansas Tech University is accredited by The Higher Learning Commission and is a member of the North Central Association of Colleges and Schools; The Association to Advance Collegiate Schools of Business; National Council for Accreditation of Teacher Education; National Association of Schools of Music; National League for Nursing Accrediting Commission; Commission on Accreditation of Health Informatics and Information Management Education: Health Information Administrator; Commission on Accreditation of Allied Health Education Program: Medical Assistant; Engineering Accreditation Commission of the Accreditation Board for Engineering and Technology; American Chemical Society; National Recreation and Park Administration Council on Accreditation; Accreditation Commission for Programs in Hospitality Administration; Foundation of Higher Education in Emergency Management: Emergency Administration and Management; and Computer Accreditation Commission of the Accreditation Board for Engineering and Technology.

**CALENDAR & CREDIT HOURS:**
The academic year consists of two fifteen-week semesters (fall and spring) and one summer term with two five-week summer sessions. All credit awarded is in semester hour credit.

**COURSE NUMBERING:**

| | |
|---|---|
| 0000 to 0999 | developmental or remedial courses *(not calculated in earned hours)* |
| 1000 to 1999 | freshman level courses |
| 2000 to 2999 | sophomore level courses |
| 3000 to 3999 | junior level courses |
| 4000 to 4999 | senior level courses |
| 5000 and above | graduate level courses |

**GRADING SYSTEM:**

| GRADE | SIGNIFICANCE | QUALITY POINTS |
|---|---|---|
| A | Excellent | 4.0 |
| B | Above Average | 3.0 |
| C | Average | 2.0 |
| D | Below Average | 1.0 |
| F | Failing | 0.0 |
| FE | Dropped for Excessive Absences | 0.0 |
| I | Incomplete *(becomes an "F" after one semester if not removed)* | |
| AU | Audit | |
| CE | Credit by Exam | |
| CR | Credit | |
| IP | In Progress | |
| NG | No Grade Awarded | |
| NR | Grade not recorded at this time | |
| P | Pass | |
| R | No Grade *(course to be repeated)* | |
| T_ | Transfer | |
| W | Withdrawn | |
| WN | Withdrawn for Non-Attendance | |
| WP | Withdrawn Passing | |
| WF | Withdrawn Failing | |
| * | Remedial *(not calculated in earned hours after May 2007)* | |
| _N* | Remedial, must be repeated *(not calculated in earned hours)* | |
| _Q* | Remedial, must repeat to advance to College Algebra *(not calculated in earned hours)* | |
| ** | English Language Institute *(not calculated in earned hours or GPA)* | |

Letters following the credit hours indicate the course has been repeated.
E Excluded
I Included

**CLASS STANDING:**

| | | |
|---|---|---|
| Freshman | 0-29 | earned hours |
| Sophomore | 30-59 | earned hours |
| Junior | 60-89 | earned hours |
| Senior | 90 or more | earned hours |

**GENERAL EDUCATION CORE:**

**English (6 hours)**
(See Course Descriptions for minimum grade requirements)

ENGL 1013 Composition I (ACTS-ENGL 1013) or ENGL 1043 Honors Composition I
ENGL 1023 Composition II (ACTS-ENGL 1023) or ENGL 1053 Honors Composition II

**Mathematics (3 hours)**
(See Course Descriptions for minimum grade requirements)

MATH 1003 College Mathematics (ACTS-MATH 1113)
MATH 1113 College Algebra (ACTS-MATH 1103)
STAT 2163 Introduction to Statistical Methods (ACTS-MATH2103)
Any higher level mathematics course

**Science (8 hours)**
Complete a total of eight hours of science with laboratory

**US History or Government (3 hours)**
HIST 1903 Survey of American History
HIST 2003 United States History to 1877 (ACTS-HIST 2113)
HIST 2013 United States History since 1877 (ACTS-HIST 2123)
HIST 2043 Honors United States History to 1877
POLS 2003 American Government (ACTS-PLSC 2003)

**Social Sciences, Fine Arts/Humanities, Speech Communications (15 hours)**
**(Complete one of the following 3 options):**

**Option 1:** **Fine Arts and Humanities – 6 hours**
**Social Sciences – 6 hours**
**Speech Communications – 3 hours**

**Option 2:** **Fine Arts and Humanities – 9 hours**
**Social Sciences – 6 hours**

**Option 3:** **Fine Arts and Humanities – 6 hours**
**Social Sciences – 9 hours**

**Fine Arts and Humanities**
ART 2123 Experiencing Art (ACTS-ARTA 1003)
ENGL 2003 Introduction to World Literature (ACTS-ENGL 2113)
ENGL 2013 Introduction to American Literature (ACTS-ENGL 2653)
ENGL 2023 Honors World Literature
ENGL 2173 Introduction to Film
ENGL 2183 Honors Introduction to Film
JOUR 2173 Introduction to Film
MUS 2003 Introduction to Music (ACTS-MUSC 1003)
PHIL 2003 Introduction to Philosophy (ACTS-PHIL 1103)
PHIL 2043 Honors Introduction to Philosophy
PHIL 2053 Introduction to Critical Thinking (ACTS-PHIL 1003)
TH 2273 Introduction to Theatre (ACTS-DRAM 1003)

**Social Sciences** (Students majoring in engineering may substitute up to six hours of upper level humanities, social sciences, mathematics, or science)

AGBU 2063 Principles of Agricultural Macroeconomics
AGBU 2073 Principles of Agricultural Microeconomics
AMST 2003 American Studies
ANTH 1213 Introduction to Anthropology (ACTS-ANTH 1013)
ANTH 2003 Cultural Anthropology (ACTS-ANTH 2013)
ECON 2003 Principles of Economics I (ACTS-ECON 2103)
ECON 2013 Principles of Economics II (ACTS-ECON 2203)
ECON 2103 Honors Principles of Economics I
GEOG 2013 Regional Geography of the World (ACTS-GEOG 2103)
HIST 1503 World History to 1500 (ACTS-HIST 1113)
HIST 1513 World History since 1500 (ACTS-HIST 1123)
HIST 1543 Honors World History to 1500
HIST 1903 Survey of American History
HIST 2003 United States History to 1877 (ACTS-HIST 2113)
HIST 2013 United States History since 1877 (ACTS-HIST 2123)
HIST 2043 Honors United States History to 1877
POLS 2003 American Government (ACTS-PLSC 2003)
PSY 2003 General Psychology (ACTS-PSYC 1103)
SOC 1003 Introductory Sociology (ACTS-SOCI 1013)

**Speech Communications**
COMM 1003 Introduction to Communication
COMM 2003 Public Speaking
COMM 2173 Business and Professional Speaking

# Haley Kiser

hkiser@email.sc.edu | 870.688.0227 | 1028 Pope St., Columbia, SC 29201

## WRITING SAMPLE

The following writing sample is an unedited legal memorandum I drafted. The memo analyzes whether a person injured from a dog bite while on private property can hold the homeowner and person caring for the dog at the time liable under South Carolina law. Before writing this memo, I was assigned to research the relevant authorities and make my own prediction.

MEMORANDUM

To: Paul Sampson
From: Law Clerk, Haley Kiser
Re: Possible Dog Bite Claim, Nora Hursh & Claudia Benitz-Clark, File # 3648.01
Date: September 22, 2020

**Facts**

Nora Hursh and Alex Thacker are friends who met when they began an AmeriCorps Program, City Year, together and are currently in their second year of the program. Mr. Thacker lives with his aunt, Claudia Bentiz-Clark, in the basement apartment of her home. Ms. Benitz-Clark owns this home and allows Mr. Thacker to use the backyard as he wishes. He has lived with Ms. Benitz-Clark for the past year and a half, since he moved from Texas to join City Year. Mr. Thacker owns a four-year-old German Shepherd named Sadie, who Nora says bit her last month at Mr. Benitz-Clark's home.

One month ago, Ms. Hursh wanted to borrow Mr. Thacker's tube to go tubing down the river, but she knew Mr. Thacker was out of town on a four-day hiking trip in Tennessee. Ms. Hursh texted him to ask if she could borrow the tube and Mr. Thacker responded that she could come over to retrieve it. Mr. Thacker said that his aunt, Ms. Benitz-Clark, would be there and could let her into his basement apartment. Ms. Benitz-Clark met Ms. Hursh at the front of the house and gave Ms. Hursh the key to Mr. Thacker's downstairs apartment. Ms. Benitz-Clark told Ms. Hursh that she had just put Mr. Thacker's dog, Sadie, in the backyard and asked Ms. Hursh to be careful not to let the dog out of the backyard. Ms. Hursh walked through the gate and shut it behind her. Then, Sadie approached Ms. Hursh wanting to play. Because Ms. Hursh was in a

rush, she did not engage with the dog. Ms. Hursh accidently dropped Ms. Benitz-Clark's key, and when Ms. Hursh leaned down to pick up the key, Sadie bit her hand. When Ms. Hursh yelped in pain, Ms. Benitz-Clark came running into the backyard, grabbed Sadie by the collar, and led her inside the basement apartment.

Ms. Hursh's primary injury was to her right index and middle fingers, which required delicate surgery the week following the bite. Her index finger remains numb, which may limit her medical school opportunities. Ms. Hursh has now contacted our firm because she is interested in determining if Ms. Benitz-Clark might be financially responsible for Ms. Hursh's injuries.

**Discussion**

Ms. Hursh can most likely hold Ms. Benitz-Clark liable under South Carolina's dog bite statute for Ms. Hursh's dog bite injury because Sadie bit her while she was lawfully on private property and while Ms. Benitz-Clark had Sadie in her care and keeping. A person having the dog in the person's care or keeping is liable for the damages suffered by the person bitten when the person is bitten while lawfully on private property, without provocation. S.C. Code Ann. § 47-3-110 (2017). Provocation will likely not be an issue in this case because simply dropping the keys does not constitute provocation.

It has been determined that Sadie bit Ms. Hursh as there is no dispute about this fact. Sadie bit Ms. Hursh when she leaned over to pick up the keys she dropped in Ms. Benitz-Clark's backyard. When Ms. Hursh yelped in pain, Ms. Benitz-Clark came running into the backyard, grabbed Sadie by the collar, and led her inside the basement apartment. Thus, there is no question that Sadie bit Ms. Hursh.

Additionally, it will likely be determined that Ms. Hursh was lawfully on Ms. Benitz-Clark's private property because she received invitations from both Mr. Thacker and Ms. Benitz-Clark to be on the property. A person bitten is lawfully on private property when the person bitten is "on the property upon the invitation, express or implied, of the property owner or a lawful tenant or resident of the property." *Id.* Ms. Hursh was lawfully on private property by receipt of an express invitation from Mr. Thacker through text message when he said Ms. Hursh could come to his apartment. When Ms. Hursh arrived, Ms. Benitz-Clark gave Mr. Thacker's apartment key to Ms. Hursh, which is an implied invitation. Thus, circumstances show that Ms. Hursh was lawfully on Ms. Benitz-Clark's private property upon invitation.

Ms. Benitz-Clark likely had Sadie in her care and keeping because of her actions of tending to the dog when Mr. Thacker was away. In order to be liable as a property owner, he or she would have to exercise control over the premises and assume some duty to care for or keep the dog. *Clea v. Odom*, 394 S.C. 175, 181, 714 S.E.2d 542, 544 (2011). The use of the phrase "care or keeping' requires that the "other person" having the dog in his or her care or keeping act in a manner which manifests an acceptance of responsibility for the care or keeping of the dog. *Id.* at 180, 714 S.E.2d at 544 (citing *Harris v. Anderson Cty. Sheriff's Off.*, 381 S.C. 357, 364, 673 S.E.2d 423, 427 (2009)). To be held liable, one cannot simply be an owner of a property with a dog but must also have the dog in his or her care and keeping. *Bruce v. Durney*, 341 S.C. 563, 573, 534 S.E.2d 720, 726 (Ct. App. 2000). Keeping can be defined as exercising some measure of care, custody, or control over the dog. *Id*. at 573, 534 S.E.2d at 726.

In *Bruce*, the defendant/property owner was not held liable to a third person for a dog bite injury because the dog was not in his care or keeping. *Id.* at 574, 534 S.E.2d at 726. This dog was owned by tenants who resided on the property owned by the defendant/property owner. *Id.* at

565, 534 S.E.2d at 721. This defendant/property owner allowed the dog to be kept on this property, exercising some measure of control, but this was not enough to call him the dog's "keeper." *Id.* at 573-574, 534 S.E.2d at 726. The defendant/property owner had lived elsewhere for over 40 years and occasionally visited the property about once per week. *Id.* at 565, 534 S.E.2d at 721. However, there was "no evidence that he provided any care or support for the dog." *Id.* at 574, 534 S.E.2d at 726.

In *Nesbittt v. Lewis*, the defendant/daughter was found not liable for dog bite injuries suffered by a third party because the defendant/daughter lacked possession and control over the property and did not have the dogs in her care or keeping. 335 S.C. 441, 446, 517 S.E.2d 11, 14 (Ct. App. 1999). This attack occurred in a home owned by a mother, who is a majority property owner, and her son and daughter, who are minority property owners. *Id.* at 444, 517 S.E.2d at 13. The defendant/daughter had lived elsewhere for five years and exercised no possession or control over the property or the dogs at the time of the attack. *Id.* at 446-47, 517 S.E.2d at 14. However, the defendant/son and defendant/mom were held liable for the injuries because they "clearly had the requisite possession and control of the dogs and premises." *Id.* at 446, 517 S.E.2d at 14. The defendant/son and defendant/mom lived on the property together. *Id.* Furthermore, the defendant/son tended to the dogs by taking the dogs to the vet, feeding the dogs, and playing with the dogs showing. *Id.*

*Clea v. Odom* established that maybe occasionally interacting with the dog by sitting with him, playing with him, and giving him handfuls of food was enough to rise to the level of care and keeping of the dog. 394 S.C. 175, 178, 714 S.E.2d 542, 544 (2011). The defendant in *Clea* was a property owner/landlord who interacted with a dog kept in the common area in this way, but the defendant did not live on the property or otherwise care for the dog. *Id.* This dog attacked

the plaintiff in this case as it was chained in a common area, which the defendant knew about. *Id.* The court decided that this might be enough to hold the defendant liable for the attack. *Id.*

In Ms. Hursh's case, Ms. Benitz-Clark can likely be held liable under South Carolina's dog bite statute for Ms. Hursh's injuries because Ms. Benitz-Clark exercised control over the premises and had Sadie in her care, custody, and control at the time of the dog bite. Like the defendant in *Bruce*, Ms. Benitz-Clark is the complete owner of the property. However, unlike the defendant in *Bruce*, Ms. Benitz-Clark exercised complete control over the premises as she also lived on the property and was there every day. Ms. Benitz-Clark is also similar to the defendant/mom in *Nesbitt* who was the majority property owner held liable to a third party. Like this defendant/mom, Ms. Benitz-Clark also has the requisite possession and control over the premises. She further demonstrated her control of the premises by providing a key to Ms. Hursh and giving her permission to enter the backyard.

Ms. Benitz-Clark was caring for Sadie at the time of the dog bite incident. Although Ms. Benitz-Clark did not own Sadie or care for her every day, she was the sole person responsible for Sadie's care while Mr. Thacker was away on a four-day trip. During this time Ms. Benitz-Clark was responsible for caring for Sadie by feeding her and letting her into the backyard. Ms. Benitz-Clark is like the defendant/son in *Nesbitt* in this way. Ms. Benitz-Clark cared for Sadie in the same way as the defendant/son and admits that she lets Sadie out a couple of times a month even when Mr. Thacker is not away.

Ms. Benitz-Clark also had Sadie in her custody and exercised control over Sadie at the time of the dog bite incident. Like the defendant/son in *Nesbitt*, Ms. Bentiz-Clark allowed Ms. Hursh to enter the backyard where Ms. Benitz-Clark had put Sadie. After Ms. Hursh was injured, Ms. Benitz-Clark quickly took control of Sadie by grabbing Sadie's collar and putting her into

the basement apartment. Again, as Mr. Thacker was away on a four-day trip, Ms. Benitz-Clark was the only other person in the home and the sole person responsible for Sadie while Mr. Thacker was away.

On the other hand, Ms. Benitz-Clark might argue that the mere fact that she occasionally helped Mr. Thacker with the dog does rise to the same level of acceptance of responsibility and care for the dog as the defendant/son in *Nesbitt*. For example, she might argue that she never took the dog to the vet like the defendant/son. While Ms. Benitz-Clark might argue this point, what she did do in caring for Sadie was more than the defendant in *Clea* who only occasionally gave a dog handfuls of food when he visited the property he owned.

Finally, it can easily be shown that Ms. Benitz-Clark exercised control over the premises and had Sadie in her care and keeping at the time that Ms. Hursh was bitten because Ms. Benitz-Clark was the property owner and responsible for Sadie while Mr. Thacker was away; feeding and letting Sadie into the backyard.

**Conclusion**

Therefore, Ms. Benitz-Clark would likely be held liable under South Carolina's dog bite statute for Ms. Hursh's injuries because Sadie bit Ms. Hursh while she was lawfully on private property and while Ms. Benitz-Clark had Sadie in her care and keeping.

## Applicant Details

| | |
|---|---|
| First Name | **Phillip** |
| Last Name | **Klindt** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **Pklindt@nd.edu** |
| Address | **Address**<br>**Street**<br>**54721 Burdette St. Apt 1411**<br>**City**<br>**South Bend**<br>**State/Territory**<br>**Indiana**<br>**Zip**<br>**46637**<br>**Country**<br>**United States** |
| Contact Phone Number | **9044000748** |
| Other Phone Number | **9044000748** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **University of South Florida** |
| Date of BA/BS | **May 2019** |
| JD/LLB From | **Notre Dame Law School**<br>**http://law.nd.edu** |
| Date of JD/LLB | **May 14, 2022** |
| Class Rank | **School does not rank** |
| Does the law school have a Law Review/ Journal? | **Yes** |
| Law Review/Journal | **No** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

O'Byrne, Christopher
cobyrne@nd.edu
574.631.5664
Venter, Christine
cventer@nd.edu
574-631-5216

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

PHILLIP KLINDT
54721 Burdette St., Apt. 1411
South Bend, IN 46637
904-400-0748
Pklindt@nd.edu

June, 15 2021

Dear Judge Hanes,

I am a second-year student at Notre Dame Law School and am writing to apply for a clerkship in your chambers beginning in August 2022.

As you will see from my enclosed resume, I spent last summer interning for The Honorable Robert J. Conrad, United States District Judge, Western District of North Carolina. That experience, together with my advanced studies in legal research and my upcoming internship with the Manhattan District Attorney's Office will have me well prepared for a clerkship in your chambers. I am particularly interested in serving as your law clerk because I have learned the important work that federal judges do both in criminal and civil cases from my father, who is a Magistrate Judge in the Middle District of Florida. His time on the bench has taught me that every party deserves the utmost respect, and each case, proceeding, and opinion requires careful consideration and attention to detail. I hope to bring this perspective to your chambers.

Included in my application packet please find a copy of my resume, my law school transcript, and a writing sample. My writing sample is a draft of an opinion I wrote for Judge Conrad last summer. It is included with his permission. Also, a letter of recommendation from Melissa Nelson, State Attorney for the Fourth Judicial Circuit in Florida (904-255-2500), is enclosed.

Thank you for considering my application. Please contact me if I can provide you with any additional information. I look forward to hearing from you.

Respectfully,

Phillip J. Klindt

# Phillip J. Klindt

1605 Brookwood Rd.
Jacksonville, FL 32207

Pklindt@nd.edu
(904) 400-0748

54721 Burdette St., Apt. 1411
South Bend, IN 46637


## EDUCATION

**University of Notre Dame Law School** — Notre Dame, IN
*Juris Doctor Candidate* — May 2022
GPA: 3.50 (University does not rank law students)
Activities: Notre Dame Journal of Legislation, Managing Notes Editor
Fall 2020 Research Assistant to Professor Barry Cushman
Honors: Honor Roll Spring 2021

**University of South Florida** — Tampa, FL
*Bachelor of Arts, Political Science with a minor in Criminology* — May 2019
GPA: 3.84 (magna cum laude)
Honors: Dean's List Fall 2017 through Fall 2018
Activities: High School Baseball Assistant Coach 2015 - 2016

## EXPERIENCE

**State Attorney's Office, Fourth Judicial Circuit** — Jacksonville, FL
*Winter Break Volunteer Law Intern* — December 2020 - January 2021
- Reviewed case files and prepared charging recommendations
- Researched statewide policies related to officer involved shootings

*Undergraduate Intern* — May 2017 - July 2017
- Prepared summaries and PowerPoint presentations of evidence
- Listened to and summarized jail call recordings for ongoing cases

**United States District Court, Western District of North Carolina** — Charlotte, NC
*Summer Intern to the Hon. Robert J. Conrad, United States District Judge* — May 2020 - July 2020
- In civil matters, researched and drafted orders involving subject matter jurisdiction, venue, preliminary injunctions, and social security
- In criminal matters, worked on one of the first federal criminal trials held during the COVID Pandemic, prepared trial memorandum regarding a complex evidentiary rule 404(b) issue, and drafted an order regarding request to withdraw a guilty plea

**United States Attorney's Office, Middle District of Florida** — Tampa, FL
*Student Clerk, Automated Litigation Support* — December 2017 - June 2019
- Organized pretrial discovery for over 50 criminal cases
- Prepared electronic exhibits for trials and hearings
- Compiled and consolidated records in criminal cases for sentencing purposes
- Trained Appellate division undergraduate interns

*Undergraduate Intern* — April 2018 - August 2018
- Organized exhibits for trial
- Attended criminal trials and other court proceedings

## INTERESTS

Spin Cycling (Peloton), Basketball, Softball, Hiking

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Student No: U36971594 Date of Birth: 09/22/1996 Date Issued: 06/07/2021

Record of: Phillip Klindt O F F I C I A L

Page: 1

Requestor: CRED000196546

Student is currently a (F) FL Res

Exam Credit
Spring 2014

| | | CRED | GRD | Q.P. R |
|---|---|---|---|---|
| AMH 1000 | United States History (3) Advanced Placement Exam Credit | 3.00 | NG | 0.00 |

GPA: 0.00 Ehrs: 3.00 GPAhrs: 0.00 0.00

Admitted to Undergraduate Degree Program

Summer 2015 05/11/2015 - 08/07/2015
Behavioral and Community Sci
Criminology

| | | CRED | GRD | Q.P. R |
|---|---|---|---|---|
| PHI 1600 | T Introduction To Ethics | 3.00 | B+ | 9.99 |
| SYG 2000 | T Introduction to Sociology | 3.00 | A | 12.00 |

GPA: 3.66 Ehrs: 6.00 GPAhrs: 6.00 21.99

Fall 2015 08/24/2015 - 12/11/2015
Behavioral and Community Sci
Criminology

| | | CRED | GRD | Q.P. R |
|---|---|---|---|---|
| CCJ 3014 | T Crime & Justice in America | 3.00 | A | 12.00 |
| ENC 1101 | T Composition I | 3.00 | A- | 11.01 |
| MGF 1106 | T Finite Mathematics | 3.00 | B+ | 9.99 |
| SLS 2901 | T Academic Foundations Seminar Service Learning Experience | 3.00 | A | 12.00 |

GPA: 3.75 Ehrs: 12.00 GPAhrs: 12.00 45.00

********** CONTINUED ON NEXT COLUMN **********

Spring 2016 01/11/2016 - 05/06/2016
Behavioral and Community Sci
Criminology

| | | CRED | GRD | Q.P. R |
|---|---|---|---|---|
| ENC 1102 | T Composition II | 3.00 | A | 12.00 |
| GEA 2000 | T World Regional Geography | 3.00 | A- | 11.01 |
| MUH 3016 | T Survey Of Jazz | 3.00 | A- | 11.01 |
| STA 2122 | T Social Science Statistics | 3.00 | A | 12.00 |

GPA: 3.83 Ehrs: 12.00 GPAhrs: 12.00 46.02

Fall 2016 08/22/2016 - 12/08/2016
Behavioral and Community Sci
Criminology

| | | CRED | GRD | Q.P. R |
|---|---|---|---|---|
| CCJ 3024 | T Survey of Crim Justice Syst | 3.00 | A- | 11.01 |
| EDF 2005 | T Intro to Teaching Profession | 3.00 | A+ | 12.00 |
| EVR 2001 | T Intro to Environmental Sci | 3.00 | A | 12.00 |
| HUN 2201 | T Nutrition | 3.00 | B | 9.00 |

GPA: 3.66 Ehrs: 12.00 GPAhrs: 12.00 44.01

Spring 2017 01/09/2017 - 05/04/2017
Behavioral and Community Sci
Criminology

| | | CRED | GRD | Q.P. R |
|---|---|---|---|---|
| GLY 2100 | T History of Life | 3.00 | B | 9.00 |
| INR 2002 | T Intro to Int'l Relations | 3.00 | B+ | 9.99 |
| POS 2041 | T American National Government | 3.00 | A | 12.00 |
| REL 2300 | T Intro to World Religions | 3.00 | A- | 11.01 |
| THE 2252 | T Great Performances on Film | 3.00 | A | 12.00 |

GPA: 3.60 Ehrs: 15.00 GPAhrs: 15.00 54.00

********** CONTINUED ON PAGE 2 **********

Student No: U36971594 Date of Birth: 09/22/1996 Date Issued: 06/07/2021

Record of: Phillip Klindt O F F I C I A L

Page: 2

Fall 2017 08/21/2017 - 12/07/2017
Arts and Sciences
Political Science

| | | | CRED | GRD | Q.P. R |
|---|---|---|---|---|---|
| ASL | 2140C | T Basic American Sign Language | 4.00 | A | 16.00 |
| CCJ | 3117 | T Theories of Criminal Behavior | 3.00 | A | 12.00 |
| CPO | 2002 | T Intro to Comparative Politics | 3.00 | A | 12.00 |
| POT | 3003 | T Intro to Political Theory | 3.00 | A- | 11.01 |
| | | GPA: 3.92 Ehrs: 13.00 GPAhrs: 13.00 | | | 51.01 |

Dean's List

Spring 2018 01/08/2018 - 05/03/2018
Arts and Sciences
Political Science

| | | | CRED | GRD | Q.P. R |
|---|---|---|---|---|---|
| ASL | 2150C | T Interm American Sign Language | 4.00 | A | 16.00 |
| CCJ | 4224 | T Miscarriages of Justice | 3.00 | A | 12.00 |
| POS | 2080 | T American Political Tradition | 3.00 | A+ | 12.00 |
| POS | 3713 | T Empirical Political Analysis | 3.00 | A | 12.00 |
| THE | 4574 | T Sport as Performance | 3.00 | A+ | 12.00 |
| | | GPA: 4.00 Ehrs: 16.00 GPAhrs: 16.00 | | | 64.00 |

Dean's List

Summer 2018 05/14/2018 - 08/03/2018
Arts and Sciences
Political Science

| | | | CRED | GRD | Q.P. R |
|---|---|---|---|---|---|
| INR | 4083 | S Conflict in the World | 3.00 | A+ | 12.00 |
| POS | 4941 | T Field Work | 6.00 | A | 24.00 |
| | | GPA: 4.00 Ehrs: 9.00 GPAhrs: 9.00 | | | 36.00 |

********** CONTINUED ON NEXT COLUMN **********

Fall 2018 08/20/2018 - 12/06/2018
Arts and Sciences
Political Science

| | | | CRED | GRD | Q.P. R |
|---|---|---|---|---|---|
| CCJ | 4361 | T Death Penalty | 3.00 | A | 12.00 |
| ECO | 2023 | P Microeconomic Principles | 3.00 | A+ | 12.00 |
| POS | 2112 | T State/Local Govt & Politics | 3.00 | A | 12.00 |
| POS | 4413 | T The American Presidency | 3.00 | A+ | 12.00 |
| | | GPA: 4.00 Ehrs: 12.00 GPAhrs: 12.00 | | | 48.00 |

Dean's List

Spring 2019 01/07/2019 - 05/02/2019
Arts and Sciences
Political Science

| | | | CRED | GRD | Q.P. R |
|---|---|---|---|---|---|
| CCJ | 4933 | T Top: Serial Killers | 3.00 | A+ | 12.00 |
| ENC | 3250 | T Professional Writing | 3.00 | A | 12.00 |
| POT | 3013 | T Classical Political Theory | 3.00 | A | 12.00 |
| SLS | 3308 | T Job Search | 1.00 | A+ | 4.00 |
| | | GPA: 4.00 Ehrs: 10.00 GPAhrs: 10.00 | | | 40.00 |

Bachelor of Arts Awarded May 4, 2019
Magna Cum Laude
Majr: Political Science
Minr: Criminology

FL BOG Civic Literacy: Exempt

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL SYSTEM | 117.00 | 117.00 | 450.03 | 3.84 |
| TOTAL TRANSFER | 3.00 | 0.00 | 0.00 | 0.00 |
| OVERALL | 120.00 | 117.00 | 450.03 | 3.84 |

********** END OF TRANSCRIPT **********

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**Calendar System:** USF has used different academic calendars since opening on September 26, 1960. USF operated under the traditional semester calendar from Fall 1960 through Summer 1963. A conversion to trimesters was implemented between Fall 1963 and Summer 1967. A quarter calendar was used between Fall 1967 and Summer 1981. Beginning Fall 1981, USF adopted a modified semester calendar, which is still in effect.

| Years | Calendar Type | Credit |
|---|---|---|
| Fall 1960- Summer 1963 | Semester | Semester |
| Fall 1963- Summer 1967 | Trimester | Semester |
| Fall 1967- Summer 1981 | Quarter | Quarter* |
| Fall 1981- present | Modified Semester | Semester |

*All credit hours are posted in semester equivalents; CLEP awarded between Fall 1967-Summer 1981 has not been converted, except in total CLEP hours.

**Course Numbers:** Courses are numbered using the State of Florida Course Numbering System for courses beginning Fall 1978; USF's own system was used prior to Fall 1978. Under both systems, course numbers beginning with 1 or 2 are lower division, courses beginning with 3 or 4 are upper division and courses beginning with 5, 6, 7, 8 or 9 are graduate level.

**Grade Point Average (GPA):** GPAs are computed by dividing the total number of quality points by the total gradable hours attempted at USF. The total quality points are calculated by multiplying the number of credits assigned to each course by the quality point value of the grade given. GPAs are truncated to two decimals (3.48) and rounded up to the thousandth.

If a student originally earns a grade in a course that may not be repeated for additional credit and then earns another grade on a subsequent enrollment of the same course, both grades are averaged into the GPA unless the Grade Forgiveness Policy is applied. Graduate students are not eligible for grade forgiveness.

Courses taken at USF as non-degree-seeking are not computed in the USF GPA unless the courses are transferred in and applied to the degree requirements. Grades for transfer credits accepted toward the major are not counted in the USF GPA.

**Grading System:** USF uses a four point grading system to measure academic achievement in quality points; all grades earned, regardless of course level, are posted on the transcript. The assigned grades, performance level, and earned quality points are as follows:

| Grade | Performance Level | Quality Points |
|---|---|---|
| A+ | | 4.00 |
| A | Excellent Performance | 4.00 |
| A- | | 3.67 |
| B+ | | 3.33 |
| B | Good Performance | 3.00 |
| B- | | 2.67 |
| C+ | | 2.33 |
| C | Average Performance | 2.00 |
| C- | | 1.67 |
| D+ | | 1.33 |
| D | Poor Performance | 1.00 |
| D- | | 0.67 |
| F | Failure | 0.00 |
| IF | Incomplete Grade Changed to Failure | 0.00 |

**Repeat Coursework:** Credit hours for repeated USF coursework will be awarded only once per course unless the course is an University approved repeatable course. Courses with an Repeat (R) flag are treated as follows:

E Repeated- First Attempt, Not Included in the GPA
I Repeated- Last Attempt, Included in GPA

**Eligibility to Re-enroll:** This student is academically eligible to re-enroll within the USF unless otherwise noted.

| Other Indicators | Explanation |
|---|---|
| I | Incomplete; counted in attempted hours, but not GPA |
| IU | Incomplete grade changed to Unsatisfactory; counted in attempted hours, but not GPA |
| M | No grade submitted by instructor; counted in attempted hours, but not GPA |
| MF | Missing grade changed to Failure; counted in attempted hours, but not GPA (discontinued Spring 2016) |
| MU | Missing grade changed to Unsatisfactory; counted in attempted hours, but not GPA (discontinued Spring 2016) |
| N | Audit; counted in attempted hours, but not GPA |
| NC | Not counted transfer coursework; not counted in attempted hours or GPA |
| NG | No grade equivalent for transfer coursework; counted in attempted hours, but not GPA |
| NR | Missing grade that's not resolvable |
| Q | Incomplete (discontinued Fall 1981) |
| R | Repeat transfer coursework; counted in attempted hours, but not GPA |
| S | Satisfactory (Pass); counted in attempted hours, but not GPA |
| U | Unsatisfactory (Fail); counted in attempted hours, but not GPA |
| W | Withdrawal from course without penalty; counted in attempted hours, but not GPA |
| WC | Withdrawal for extenuating circumstances; counted in attempted hours, but not GPA |
| X | Incomplete (discontinued Fall 1972) |
| Z | Indicates continuing registration; counted in attempted hours, but not GPA |
| - | Credit given; not counted in GPA (discontinued Summer 2017) |
| # | Academic Renewal; counted in attempted hours, but not GPA |
| * | Academic Renewal; counted in attempted hours, but not GPA |

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St. Petersburg, FL 33701
727-873-4645

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8350 N Tamiami Trail, SMC C107
Sarasota, FL 34243
941-359-4330

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Taneja College of Pharmacy
560 Channelside Dr, MDD 32
Tampa, FL 33602
813-974-0828

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STATE ATTORNEY'S OFFICE
FOURTH JUDICIAL CIRCUIT OF FLORIDA

MELISSA WILLIAMSON NELSON
STATE ATTORNEY

311 WEST MONROE STREET
JACKSONVILLE, FLORIDA 32202
(904) 255-3002
MWNELSON@COJ.NET

February 26, 2021

RE: Recommendation of Phillip Klindt

To Whom It May Concern:

I write to offer my highest recommendation of Phillip Klindt for a judicial clerkship with your office. Phillip is a sharp, reliable, and hard-working young man. During the summer of 2017, Phillip interned with our office and impressed everyone with whom he worked. Over the course of his time with us, Phillip was charged with various tasks that required attention to detail, appreciation of forensic science advances, creativity, and thoughtful analysis.

More recently, Phillip volunteered with us over his break from Notre Dame Law School. I had been saving a project for the right person because it was important that it was completed both correctly and with tact. I asked Phillip to conduct a fact-intensive research inquiry that required him to communicate with elected state attorneys throughout the state of Florida. Phillip was indeed the right person for the job. He did an outstanding and thorough job and his work product will give rise to a statewide discussion regarding the handling of critical incidents involving law enforcement.

In addition to this practical experience in the state criminal system, Phillip's work at the U.S. Attorney's Office, Middle District of Florida and for the Honorable Robert Conrad, U.S. District Court in North Carolina has provided him perspective that will undoubtedly benefit him as a judicial law clerk.

Phillip worked full time through college and graduated *magna cum laude*. While at Notre Dame Law School, Phillip has excelled in his legal research and writing classes, served as a research assistant to a prize-winning author and professor, and is currently the editor of and contributor to a law journal.

If hired to clerk, Phillip will prove himself a valuable asset and colleague. I highly recommend him for this opportunity.

Please do not hesitate to contact me should you have any questions.

Sincerely,

Melissa W. Nelson

June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to offer my enthusiastic recommendation in support of Philip Klindt's application for a judicial clerkship. I have had the pleasure of instructing Philip in LAW 70211 Adv. Legal Research: Federal during the fall semester of 2020.

I was impressed with Philip's attention to detail from the time I graded his first weekly assignment. It was no surprise to me that he was one of only three students to earn a solid "A" level grade. Philip was one of the best students because he scrupulously follows directions and completes his tasks accurately and on time (often several days early).

The fundamental reason for Philip's potential as a judicial clerk is that he possesses excellent critical thinking, communication, and leadership skills. For example, when a question is ambiguous, he asks for clarification before proceeding. He also seeks to understand the purpose of each individual step of the research process AND the way that all of the numerous steps of the research process fit together. Thus, he has increased his understanding of research methodology while significantly reducing time spent on assignments. This benefited him in the creation of his insightful research presentation on a topic of his own choice: Qualified Immunity and the Third Force Act.

Philip put as much energy and enthusiasm into his assigned administrative (Mt. Denali and the National Park Service) and legislative history (Child Passenger Safety Act of 1984) topics as he did for his personal one. Whether his assignments are self-guided or prescribed, his work ethic and the resulting product are consistently superior.

I am even more impressed with Phillip's collegiality in the midst of a competitive environment, than I am with his inquisitive nature, level of engagement, and eagerness to apply what he has learned. Phillip's helpful nature led him to assist other students who did not understand why a particular approach (e.g., selection of a resource, formulation of a query, updating process) to legal research failed to provide the desired result. It is clear that his peers regard him as a professional, diligent, and approachable student who is genuinely enthusiastic about helping others.

Phillip has had the opportunity to explore his interests in criminal law and the judiciary over the past few years as both a law student and undergraduate. He is committed to building on those experiences with a clerkship in your chambers. I believe that Phillip will surpass your expectations for a clerk's reliability, productivity, thoughtfulness, and receptiveness to mentorship and direction. It is my hope that you will select him for this position.

Sincerely,

Christopher S. O'Byrne
Research Librarian
Kresge Law Library

Notre Dame Law School
University of Notre Dame
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June 09, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is with great pleasure that I recommend Phillip Klindt for a clerkship in your chambers. Phillip is an outstanding candidate for this position as he is an excellent researcher and writer and would be an asset to your chambers.

I came to know Phillip when he was a 1L in my Legal Writing I class and he impressed me from my very first interactions with him. He asked thoughtful questions in class, sought out ways to improve his writing, and was a leader when working in small groups. I also taught Legal Writing II (Appellate Advocacy) to Phillip and once again he stood out in class. He wrote an extremely strong brief and performed outstandingly well during oral argument. Phillip's writing skills have been recognized by the fact that he became a research assistant to Professor Cushman, one of the most distinguished members of our faculty. Phillip also was selected to join our Journal of Legislation.

Phillip would welcome the opportunity to further refine his already stellar writing and research skills. Phillip is extremely collegial, thoughtful, friendly, and has an excellent work ethic. He would be a delightful colleague. I very strongly recommend him to you. Please do not hesitate to contact me if I can provide additional information.

Sincerely,
Christine M. Venter
Director, Legal Writing Program

Christine Venter - cventer@nd.edu - 574-631-5216

Phillip J. Klindt

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Attached is a proposed Order that I submitted to the Honorable Robert J. Conrad for review. It was written in June 2020 and has been lightly edited by one of the Judge's Law Clerks, TJ Haycox. The memorandum otherwise reflects entirely my own work. Names and all identifying information of clients have been changed or redacted.

THIS MATTER is before the Court on the defendant's Motion to Withdraw Guilty Plea. (Doc. No. 43). The government has filed a Response in opposition. (Doc. No. 46).

I. PROCEDURAL HISTORY

The defendant was charged on May 22, 2019, in a six-count Indictment indicted with four counts of wire fraud, in violation of 18 U.S.C. § 1343, and two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. (Doc. No. 3). On May 23, 2019, the defendant had her initial appearance, arraignment, and was released on bond. The defendant entered a not guilty plea as to all counts. On that same day, [redacted] ("John"), Assistant Federal Public Defender, was appointed to represent her.

On September 19, 2019, the defendant filed her third motion to continue the trial in order to retain new counsel, among other things. (Doc. No. 15). This motion was granted on September 24, 2019. (Doc. No. 16). The government filed a motion for hearing as to status of counsel on October 22, 2019, because no new counsel had filed an appearance. (Doc. No. 17). The government sought to clarify whether the defendant was attempting to discharge counsel for purposes of delay. (Id. at ¶ 10). United States Magistrate Judge [redacted] held two hearings of inquiry. At the hearing on October 31, 2019, the defendant informed the magistrate judge she was in the process of retaining out-of-state counsel. (Doc. No. 18). During the follow up hearing on November 7, 2019, the government informed the magistrate judge that the defendant still had not retained counsel and that the intended new counsel

was not admitted to practice in this district. (Doc. No. 19). The magistrate judge then informed the defendant to cooperate with appointed counsel, who would remain in the case.

Following these hearings, the defendant's counsel on November 18, 2019, filed a fourth motion to continue the trial and a motion to withdraw as counsel. (Doc. No. 20). Counsel explained that he tried to meet with the defendant to prepare for trial but was repeatedly rejected. (Id. at ¶ 6). On November 21, 2019, the Court denied both motions based on insufficient grounds. (Doc. No. 21). Defendant's counsel on November 24, 2019, filed an unopposed motion for reconsideration, along with his sealed affidavit. (Doc. Nos. 22, 23). The Court conducted a status conference on November 25, 2019, to address this motion. During this status conference, the Court denied the request of counsel to withdraw but granted the motion to continue. Trial was scheduled for February 2, 2019.

At another status conference on January 21, 2020, the defendant's counsel orally renewed his motion to withdraw. His motion was denied. On January 22, 2020, [redacted] ("Knight"), Assistant Public Defender, filed a notice of appearance. The government filed a Factual Basis and Plea Agreement on the same date (Doc. Nos. 26, 27).

Paragraph 5 of the Agreement states that the defendant is aware that she faces a maximum term of 20 years imprisonment, a $250,000 fine, or both, and a period of supervised release up to three years for the offense in Count Four, to which she agreed to plead guilty. (Doc. No. 27 at 1-2). Paragraph 7 of the

agreement states that the defendant is aware that the court has not yet determined the sentence, has the final discretion to impose any sentence up to the statutory maximum for each count, and that the defendant may not withdraw the plea as a result of the sentence imposed. (Id. at 2). Paragraph 1 of the agreement states that the defendant is guilty of Count Four of the indictment. (Id. at 1). Further, paragraph 11 of the agreement states that the defendant read the factual basis document, understood the document, and that it may be used in court. (Id. at 4). The defendant signed this plea agreement. (Id. at 6).

On January 24, 2020, the defendant entered her guilty plea before Magistrate Judge [redacted]. The defendant took an oath to respond truthfully to the court's questions. (Doc. No. 43-1 at 2). The defendant responded affirmatively that her mind was clear and that she was there to enter a plea of guilty that could not be withdrawn later. (Id. at 4). The defendant responded affirmatively that she understood the maximum penalty was 20 years imprisonment, a $250,000 fine, or both, and a period of supervised release up to three years. (Id. at 6-7). The defendant responded affirmatively that she understood she had the right to plead not guilty and have a trial if she wanted. (Id. at 9-10). The defendant responded affirmatively that she understood the charge and that she was guilty of that charge. (Id. at 10).

The government explained the terms of the plea agreement, including the defendant's waiver to contest the conviction and sentence in any appeal or post-conviction action, except her right to claim ineffective assistance of counsel or

prosecutorial misconduct. (Id. at 14). Additionally, the government announced that there were no agreements, representations, or understandings between the parties in this case other than those explicitly set forth in the plea agreement. Id.

The magistrate judge asked whether the defendant had been over the plea agreement carefully with her lawyer. (Id. at 15). The defendant responded that she had not. Id. Accordingly, the magistrate judge recessed the hearing to allow the defendant and her counsel to review the plea agreement. (Id. at 15-16).

After a thirty-minute recess, the defendant responded affirmatively that she adequately had the opportunity to review the plea agreement, that she understood the terms of the agreement, and that she agreed with the terms. (Id. at 17). As to the factual basis document, the defendant stated that she understood what was in the document but stated there were incorrect facts within it. (Id. at 19). This assertion led the magistrate judge to recess again. He instructed the defendant to discuss the matter with her counsel. (Id. at 19-21).

The Court reconvened about an hour and twenty minutes later at the defendant's request. (Id. at 21). The magistrate judge acknowledged that there was an amended factual basis document that addressed the defendant's concerns, mainly the removal of facts irrelevant to Count Four of the indictment. (Id. at 21). To insure not to pressure the defendant, the magistrate judge again asked whether the defendant understood it was her decision to plead guilty and asked whether it was her desire to do so. (Id. at 22-23). The defendant responded affirmatively to both questions. (Id. at 23). The defendant then responded affirmatively that she

wanted to plead guilty. Id. Further, the defendant responded affirmatively that the changes made to the factual basis document addressed her concerns, that she understood the document and agreed with it. (Id. at 24-25). Counsel for the defendant signed this document affirming that the factual basis document was correct on defendant's behalf. (Doc. No. 28 at 2).

When questioned by the magistrate judge, the defendant indicated that she had not been threatened, intimidated, or forced to enter a guilty plea, and that no one had made any promises of leniency or of a light sentence to get her to plead guilty. (Doc. No. 43-1 at 26). The defendant also responded affirmatively that she was satisfied with the services of her attorney. (Id. at 26). Finally, the defendant again answered in the affirmative that she was pleading guilty to Count Four of the indictment. (Id. at 28). Accordingly, the magistrate judge accepted the plea upon finding that the defendant's plea was entered knowingly and voluntarily, with the understanding of the charges, potential penalties, and consequences of the plea. (Id. at 29; Doc. No. 29 at 4). The defendant was also informed that she would have 14 days to file any objection regarding her guilty plea. (Doc. No. 43-1 at 30). The defendant did not file an objection within 14 days.

On February 24, 2020, counsel for the defendant filed a renewed motion to withdraw due to a conflict of interest.[1] (Doc. No. 35). This motion states that since her guilty plea, the defendant has indicated a desire to withdraw her guilty plea

[1] The government notes in its response that the motion to withdraw was filed 14 days after the government sent its Relevant Conduct Statement to the defendant and probation indicating the defendant's total offense level could increase by four points if accepted by probation and the Court. (Doc. No. 46 at 6; Doc. No. 42 at 9).

because she is innocent, she did not understand the consequences of entering her guilty plea, and because counsel was ineffective. (Id. at 1-2). Judge [redacted] granted the motion to withdraw during a hearing on February 27, 2020, and new counsel, [redacted], ("Smith") was appointed on February 28, 2020.

On May 22, 2020, the defendant filed the instant motion to withdraw her guilty plea (Doc. No. 43). This motion detailed that the defendant and Smith met to review discovery and consult on whether to withdraw her guilty plea. (Id. at 2).

## II. LEGAL DISCUSSION

In her motion to withdraw her guilty plea under Federal Rule of Criminal Procedure 32(e), the defendant acknowledged her burden to show a "fair and just reason" for withdrawal. (Id. at 3); Fed. R. Crim. P. 11(d)(2)(B). She claims due to a conflict with counsel, she was told she had no choice but to plead guilty and that she would only accept a guilty plea if she could receive a sentence of probation. (Doc. No. 43 at 4). The defendant further claims that she did not understand she would not still be eligible for a probationary sentence as discussed with her counsel. (Id. at 4-5). Thus, the defendant claims her plea was not knowing and voluntary because "she did not fully understand the interplay between what her guideline range could be [versus] the final sentence." (Id. at 5).

The defendant also asserts her legal innocence. Id. The defendant claims that the government had to prove that she acted with the intent to defraud. (Id. at 6). The defendant believes that she never acted in October 2018, nor at any other time

that is alleged in the indictment, but instead had a deficient record-keeping system. (Id. at 7). Thus, the defendant claims she could not be guilty for the offense because she did not act with the proper intent, nor did she act at all. Id.

A defendant does not have an absolute right to withdraw a guilty plea, even before sentencing, but rather bears the burden of demonstrating that a "fair and just reason" supports her request to withdraw. Fed. R. Crim. P. 11(d)(2)(B); United States v. Moore, 931 F.2d 245, 248 (4th Cir. 1991). Courts typically consider a variety of factors in determining whether a defendant has met her burden, including: (1) whether the defendant has offered credible evidence that her plea was not knowing or not voluntary, (2) whether the defendant has credibly asserted her legal innocence, (3) whether there has been a delay between the entering of the plea and the filing of the motion, (4) whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources. Id.

It is well-settled that magistrate judges may conduct Rule 11 proceedings and accept guilty pleas with a defendant's consent. United States v. Osborne, 345 F.3d 281, 285 (4th Cir. 2003); United States v. Graham, 48 Fed. Appx. 458, 459 (4th Cir. 2002) (unpublished opinion). "[A]n appropriately conducted Rule 11 proceeding raises a strong presumption that the plea is final and binding." United States v. Wilson, 81 F.3d 1300, 1306 (4th Cir. 1996). Statements made by a defendant during the course of such a proceeding may not ordinarily be repudiated. Id. at 1308. In

fact, a strong presumption of veracity attaches to a defendant's declarations made in open court. United States v. Morrow, 914 F.2d 608, 614 (4th Cir. 1990).

Here, the defendant told the magistrate judge during the Rule 11 hearing that she understood that the maximum penalty was 20 years imprisonment, and she told him that she had the chance to discuss this with her attorney. (Doc. No. 43-1 at 7). However, in her motion, the defendant now claims that due to a conflict with her counsel over the defense of her case she did not understand the consequences of her guilty plea.[2] (Id. at 4). Given the factual record in this case, the defendant's attempt to repudiate her statements under oath is unavailing. During her Rule 11 hearing, the defendant asserted that she understood her sentence had not yet been determined and that she could receive a sentence that was different than the guidelines provided. (Id. at 8). Later during the hearing, the defendant asserted that she had not had enough time to review the plea agreement with her attorney. (Id. at 15). After a thirty-minute recess, defendant's counsel acknowledged that the defendant had specific questions about enhancements that could apply at sentencing. (Id. at 17). The defendant then responded affirmatively that she adequately had the opportunity to review the plea agreement, that she understood the terms of the agreement, and that she agreed with the terms. (Id. at 17). Further, the defendant had signed the plea agreement indicating that she understood the sentence would not be determined until sentencing. (Doc. No. 27 at ¶ 7). Therefore, the defendant's claim, that the plea was not knowing and voluntary

[2] As detailed above, the defendant was granted trial continuances to retain private counsel of her choosing. At her plea, she was represented by a different Assistant Federal Public Defender than first appointed.

because she did not fully understand the interplay between guideline range versus the final sentence, is not credible.

The defendant also claims in her motion that the plea was not knowing and voluntary because the defendant and her counsel failed to communicate, and as a result the defendant's counsel forced her to enter into the plea agreement. (Doc. No. 43 at 4). Again, given the factual record in this case, the defendant's attempt to repudiate her statements under oath at the Rule 11 hearing is unavailing. The factual record of this case indicates that the defendant's lack of cooperation with her counsel led to communication issues between counsel and the defendant. (Doc. No. 21 at 2). It appears that any conflict with counsel was caused by the defendant, not counsel. During the defendant's Rule 11 hearing, she swore that no one had threatened, intimidated, or forced her to enter a guilty plea. (Doc. No. 43-1 at 26). Further, the defendant affirmed multiple times during this hearing that it was her desire to plead guilty. (Id. at 4,10,23,28). Therefore, the defendant's claim that the plea was not knowing and voluntary because the defendant's counsel failed to communicate and forced her to plead guilty is not credible.

Regarding other factors detailed in Moore, the defendant asserts in her motion that she is legally innocent because she did not act with the sufficient intent, nor did she act at all. (Doc. No. 43 at 6-7). However, the defendant admitted in the Amended Factual Basis that she did act with an intent to defraud. (Doc. No. 28 at 2). Early in the Rule 11 hearing, the defendant claimed that there were incorrect facts in the original Factual Basis document. (Doc. No. 43-1 at 19). Later

in the hearing after a recess, the defendant affirmed under oath that the amended factual basis document was correct, and she agreed with the new document. (Id. at 24-25). Besides admitting that she acted with the required intent, the defendant also admitted she "submitted a fictious financing agreement and related documents to [redacted] to induce [redacted] to make a loan to cover the premiums on a fictious insurance policy." (Doc. No. 28 at 1). Further, the defendant admits to devising a scheme in October 2018, to defraud [redacted]. Id. The defendant has the burden to present evidence that has the "quality of power of inspiring belief," and tends to "defeat the elements in the government's prima facie case" or to "make out a successful affirmative defense." United States v. Thompson-Riviere, 561 F.3d 345, 353 (4th Cir. 2009) (citations omitted). The defendant did not meet this burden because "the mere allegation of innocence, without any new evidentiary support, is not entitled to much weight." United States v. Wells, No. 94-5666, 1996 WL 174631, at *5 (4th Cr. Apr. 12, 1996).

Consideration of the other factors detailed in Moore shows the defendant has failed to establish a fair and just reason for withdrawal of her guilty plea. One of the factors is whether there has been a delay between the entering of the plea and the filing of the motion. Moore, 931 F.2d at 248. In Moore, the Fourth Circuit found a six-week delay to be too lengthy. Id. Here, the defendant's plea was accepted by the magistrate judge on January 21, 2020. (Doc. No. 29 at 4). The defendant's motion to withdraw her plea was not filed until May 22, 2020, nearly four months later. (Doc. No. 43). Between those dates, the defendant's attorney filed a motion on

February 24, 2020, to withdraw as counsel. (Doc. No. 35). In the motion to withdraw, the defendant's counsel indicated that the defendant wanted to withdraw her plea "immediately" following the Rule 11 hearing. (Id. at ¶ 4). The defendant now asserts that she wished to withdraw her plea immediately. (Doc. No. 43 at 5). But, there is no substantial evidence to support this claim because the first indication the defendant wished to withdraw her plea was nearly five weeks after the Rule 11 hearing. (Doc. No. 35 at ¶ 4). This delay, coupled with the four-month delay between the defendant's plea and the motion to withdraw the plea, weighs against granting her request.

Whether the defendant has had close assistance of competent counsel is another factor for the Court to consider. Moore, 931 F.2d at 248. At the defendant's Rule 11 hearing on January 21, 2020, she affirmed under oath that she was satisfied with her second-appointed attorney from the Federal Defender's Office. (Doc. No. 43-1 at 26). The defendant now criticizes the former attorney for lack of communication and forcing her to enter into a plea agreement. (Doc. No. 43 at 4). However, the defendant swore that no one had threatened, intimidated, or forced her to enter a guilty plea at her Rule 11 hearing. (Doc. No. 43-1 at 26). She also responded affirmatively that she had enough time to discuss possible defenses to the charges with her then-appointed attorney. (Id. at 26). Therefore, this factor also weighs against the defendant's request.

The final factors to consider are whether withdrawal will cause prejudice to the government, and whether it will inconvenience the Court and waste judicial

resources. Moore, 931 F.2d at 248. Here, a withdrawal will cause prejudice to the government. While the defendant argues that there have been no inconveniences to the government due to COVID 19, she is mistaken. This case was set for trial on February 3, 2020, prior to the global pandemic. This pandemic has now made traveling exceedingly difficult for a variety of reasons. The government has several out of state witnesses and would be severely inconvenienced. The Court also recognizes the potential prejudice to the government if the defendant were allowed to withdraw her plea and the case were set for trial after such a delay. Additionally, the court system has a strong interest in judicial economy. Wilson, 81 F.3d at 1306. Significant resources have already been expended on the defendant's case. Further, with the difficulties surrounding COVID 19 and jury trials, the Court would be inconvenienced, especially since the defendant's trial would have taken place before the Court's shutdown caused by the pandemic. The defendant was given multiple opportunities to reject the plea agreement during her Rule 11 hearing but instead insisted on pleading guilty. Sending the case to trial would be an inconvenience to the court and would cause prejudice to the government.

Thus, all the factors recognized by the Fourth Circuit in Moore weigh against the defendant's request to withdraw her plea.

III. CONCLUSION

A proper Rule 11 hearing was conducted in this case, during which the defendant testified under oath that she understood the maximum penalty she faced, that she understood the terms of her plea agreement, that no additional promises

had been made to her, that she was satisfied with her attorney, and that amended factual basis document was true. Nearly four months later, the defendant claims she did not understand interplay between guideline range versus the final sentence and the consequences of her plea, that she was forced to plead guilty, and that she was innocent. Based on review of the record in this case, the Court finds that the defendant's claim is not credible. The Court further finds that the defendant has failed to establish a fair and just reason to justify withdrawal of her guilty plea.

IT IS, THEREFORE, ORDERED that the Defendant's Motion to Withdraw Guilty Plea is DENIED.

## Applicant Details

| | |
|---|---|
| First Name | **Sean** |
| Last Name | **Kolkey** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **seankolkey@berkeley.edu** |
| Address | **Address**<br>Street<br>**2514 Etna St.**<br>City<br>**Berkeley**<br>State/Territory<br>**California**<br>Zip<br>**94704** |
| Contact Phone Number | **8056301641** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **University of California-Los Angeles** |
| Date of BA/BS | **June 2016** |
| JD/LLB From | **University of California, Berkeley School of Law**<br>**https://www.law.berkeley.edu/careers/** |
| Date of JD/LLB | **May 11, 2022** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **California Law Review**<br>**Berkeley Journal of Employment and Labor Law** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **2020 National Moot Court Competition**<br>**2022 McBaine Moot Court Competition** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Deucher, Elizabeth
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## References

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Beth Deucher, (216) 536-8147, elizabeth.deucher@usdoj.gov;

Ted Mermin, (510) 393-8254, tmermin@law.berkeley.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

# SEAN KOLKEY

2514 Etna St., Berkeley, CA 94704 • (805) 630-1641 • seankolkey@berkeley.edu


April 7, 2022

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Albert V. Bryan United States Courthouse
401 Courthouse Square,
Alexandria, VA 22314

Dear Judge Hanes:

I am a third-year student at the University of California, Berkeley, School of Law and I am writing to apply for a clerkship in your chambers for the 2022-2023 term. As an aspiring consumer protection litigator, I am eager to clerk for a judge with a similar public interest background. Clerking in your chambers would also be an ideal fit for me geographically, as I am hoping to move closer to my family in North Carolina after law school.

My academic and extracurricular experiences evince an aptitude for the demanding work of a district court docket. During my second year, I directed one of our school's pro bono projects, competed on the Moot Court team, and concurrently authored a note which I recently published in the *California Law Review*, of which I am also a member. I received a top 5% distinction for my academic work during that same year. In my third year, I have served as both a research assistant to Professor Andrew Bradt and a senior editor of the *Berkeley Journal of Employment and Labor Law*, while also authoring the best petitioner brief and advancing to the final round of the McBaine Honors Moot Court Competition.

My professional experiences compliment my academic record and have prepared me well for a clerkship. As an advanced member of the East Bay Community Law Center's Consumer Justice Clinic, I have maintained an active caseload of low-income clients for the past three semesters. Through this work, I have responded to the diverse needs of my clients by drafting complaints, responding to discovery requests, and negotiating settlements on their behalf. I further expanded my legal research skillset as an intern in the California Attorney General's Office, where I drafted litigation strategy memoranda—often within tight time constraints—to further the office's investigatory and enforcement work.

I would be honored to contribute to and learn from your chambers as a law clerk. Please find attached my resume, transcript, writing sample, and letters of recommendation from Professor Andrew Bradt, Professor Ted Mermin, and Assistant U.S. Attorney Elizabeth Deucher. Thank you for reviewing my application materials, and I hope to speak with you further.

Sincerely,

Sean Kolkey

# SEAN KOLKEY

2514 Etna St., Berkeley, CA 94704 • (805) 630-1641 • seankolkey@berkeley.edu

## EDUCATION

**University of California, Berkeley, School of Law**
J.D. Candidate, May 2022
*Activities:* *California Law Review*, Associate Editor; *Berkeley Journal of Employment and Labor Law*, Senior Executive Editor; 2022 McBaine Moot Court Competition, Oral Argument Finalist; 2021 National Moot Court Competition, Regional Semifinalist; Plaintiffs' Law Association, Founding Member
*Honors:* 2L Academic Distinction (Top 5%); Best Petitioner Brief (2022 McBaine Moot Court Competition); Fifth Best Speaker, Fifth Best Brief (2021 National Moot Court Competition); High Honors in Consumer Protection Law (Fall 2020), Consumer Financial Regulation (Spring 2021), Conflict of Laws (Spring 2021)
*Publication:* *People over Profit: The Case for Abolishing the Prison Financial System*, 110 CALIF. L. REV. 257 (2022)

**University of California, Los Angeles**
B.A., *summa cum laude*, in Philosophy, June 2016
*Honors:* Dean's Honors List (six of six quarters)
Kalish Prize (awarded by department faculty to most promising undergraduate philosophy students)

## EXPERIENCE

**UC Berkeley, School of Law - Professor Andrew Bradt** — Berkeley, CA
*Research Assistant* — Aug. 2021 – Present
Investigate and document evolving trends within multidistrict litigation and class actions.

**Consumer Justice Clinic, East Bay Community Law Center** — Berkeley, CA
*Clinical Student Advocate* — Jan. 2021 – Present
Assist low-income individuals with consumer debt lawsuits and other disputes. Prepare court filings, negotiate settlements, perform substantive legal research, and draft other documents for clients as needed.

**Berkeley Law Wage Justice Clinic** — Oakland, CA
*Student Counselor* — Sept. 2019 – Present
*Director* — May 2020 – Apr. 2021
Advise clients filing wage claims with the California Labor Commissioner. Research relevant wage and labor laws, draft records request letters, and represent clients in claim hearings.

**Office of the California Attorney General** — Oakland, CA
*Student Intern, Worker Rights and Fair Labor Section* — Aug. 2021 – Nov. 2021
Supported Deputy Attorneys General with investigations of major corporations for wage theft and workplace safety violations. Drafted litigation strategy memoranda related to the Section's enforcement work.

**Pillsbury Winthrop Shaw Pittman LLP** — San Francisco, CA
*Summer Associate* — May 2021 – July 2021
Drafted research memoranda and court filings on diverse legal issues in both litigation and transactional practice groups.

**Supreme Court of California** — San Francisco, CA
*Judicial Extern for the Hon. Justice Ming W. Chin* — June 2020 – Aug. 2020
Prepared conference memoranda advising the Court on petitions for review. Aided chambers attorneys in the composition of draft opinions for pending civil and criminal cases.

**UCLA Philosophy Department** — Los Angeles, CA
*Teaching Assistant* — July 2017 – July 2018
Co-developed curriculum and led weekly discussion sections for 50 undergraduate students per academic quarter. Evaluated written work and assisted students during weekly office hours.

## ADDITIONAL INFORMATION

*Awards:* Five-time national and four-time state gold medalist in speech & debate; second place at the 2014 Phi Rho Pi National Tournament; first place at the 2014 CCCFA State Tournament.
*Interests:* Piano and guitar; rock climbing; hitchhiking; *The West Wing*.

U.S. Department of Justice

*United States Attorney*
*Northern District of Ohio*

United States Court House
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852

April 8, 2022

**RE: Letter of Recommendation for Sean Kolkey**

Dear Chambers:

I am writing this letter in support of Sean Kolkey's application for a judicial clerkship. In the Spring of 2021, Sean served as a clinical student with the East Bay Community Law Center's Consumer Justice Clinic and worked directly under my supervision. I have since transitioned to a new role as an Assistant United States Attorney in the Northern District of Ohio. I am confident that Sean will be an excellent and dedicated clerk and I highly recommend him for this position.

During his time with the clinic, I had the opportunity to work directly with Sean on a variety of complex and diverse legal matters. Sean consistently displayed an intellectual curiosity that will serve him well as a clerk. At our initial case conferences, Sean displayed an aptitude for understanding the contours of his assignments and always asked relevant questions to clarify his understanding of the work to be done. This thorough preparation, in conjunction with his superb work habits, meant that he did not need any micromanaging as he was completing his work. Sean was always able to effectively and expediently complete projects on his own, and I was confident that if he ever needed assistance, he would ask for it.

Sean's legal writing is highly advanced. He prepared a diverse array of written work throughout his time in clinic, including court filings, client correspondence, and research memoranda. Regardless of what was asked of him, Sean consistently produced high level work that rarely required revision. His written work was the best that I saw from any of the students I worked with during my time with the East Bay Community Law Center. I am not at all surprised to see that his writing has received acclamation outside of clinic as well; he recently published his note in the *California Law Review* and was recognized for authoring the best brief in Berkeley's highly competitive McBaine Moot Court Competition.

Sean's superior research and analytical skills allowed him to easily grasp complicated areas of law that he had not encountered before. I was fortunate to have him working on a case which involved a complicated improper service of summons problem that raised a range of novel questions. Despite having never dealt with the issue before, Sean was able to quickly identify and evaluate the relevant law, and his efficient research played a vital role in our understanding and resolving of the case. This episode was just one of many in which we asked Sean to take on an unfamiliar and unintuitive subject. Without fail, he rose to the occasion and delivered concise and valuable written work.

Outside of his own exemplary legal work, Sean also displayed a sensitivity to the needs of our team and a strong desire to ensure that his fellow clinic students were doing their best work. On more than one occasion he volunteered to relieve other students of cases when they were busy, and he consistently sought out opportunities to work collaboratively on larger projects throughout the semester. His kind personality and presence on our team were highly appreciated, and I consistently looked forward to my weekly meetings with him.

I strongly urge you to consider Sean for a position in your chambers. His work throughout law school evinces a strong dedication to public service, and a judicial clerkship would be an excellent opportunity for him to use his legal skills to help further that commitment. If you have any questions, you are welcome to call me at (216) 536-8147.

Sincerely,

Elizabeth Deucher

Elizabeth A. Deucher
Assistant United States Attorney
(216) 622-3712
elizabeth.deucher@usdoj.gov

February 27, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

***Re: Letter of Recommendation for Sean Kolkey***

Dear Judge Hanes:

I write to recommend Sean Kolkey – highly – for a judicial clerkship. Sean is smart. He is dedicated. He is creative. He is reliable. He would make an excellent addition to any chambers.

I teach Consumer Protection Law at the UC Berkeley law school and I run the Center for Consumer Law and Economic Justice there. And (in the somewhat distant past) I served as a judicial clerk myself.

Sean would make a terrific clerk.

First, his academic prowess: Sean wrote two papers for my class. Commenting on the first of these, a response to a scripted prompt requiring analysis of complex issues of First Amendment law, I wrote in my notes: “Very strong. Sophisticated. Really an excellent job.” It was, indeed, the strongest paper in the class.

Of the second, a research project on the regulation of financial services for individuals held in prisons and jails, I noted at the time that the paper was “clear, convincing and well crafted” and notable for the “breadth of the inquiry, the compelling nature of the problem, the willingness to take on the difficulties posed by situation and by politics.”

It surprised me not at all to hear that the California Law Review has decided to publish the piece.

But Sean brings more to the table than just writing skill and achievement as a law student. Equally notable is his dedication to service, particularly to those most in need of legal assistance. He has externed at the East Bay Community Law Center’s Consumer Justice Clinic, helping low-income consumers with debt collection defense and other pressing cases. He has worked at and now directs the low-wage justice clinic. He has externed at the California Attorney General’s Office.

Finally, Sean is a genuinely good and interesting person. I have spent quite a bit of time in conversation with him, and can attest to his broad-ranging interests, his genuine concern for other people, and his overall good company.

In sum, this is not just someone whose work as a judicial clerk would be exhaustively researched and gracefully written. He is also a person with whom all in chambers would be eager both to work and to have lunch.

The judge who hires Sean will, I suspect, be very happy to have done so.

All the best,

Ted Mermin

Executive Director
Center for Consumer Law & Economic Justice
UC Berkeley School of Law
(510) 393-8254
Pronouns: he/him/his

February 10, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: RECOMMENDATION OF SEAN KOLKEY FOR JUDICIAL CLERKSHIP

Dear Judge Hanes:

It is a pleasure to recommend to you my student Sean Kolkey, Berkeley Law Class of 2022, for a clerkship in your chambers. I have worked with Sean in several capacities and am impressed by his intelligence, diligence, and initiative. I therefore have no reservations in recommending him to you as a law clerk.

First things first: Sean is one of the finest students in his class. His grades place him in the top 5%, and a glance at his transcript shows that he has excelled in every kind of class we offer—whether classroom, clinical, or writing-based—even while dealing with the pandemic for much of his law school experience. He is also a member of the California Law Review and a Senior Executive Editor of the Berkeley Journal of Employment and Labor Law, and a participant in our most prestigious moot-court competition. In short, he checks all of the boxes for a top clerkship.

I have had the opportunity to get to know Sean especially well over the course of his second and third years of law school. In his 2L fall, he was a student in my seminar on Multidistrict Litigation and Mass Torts, which I teach with preeminent plaintiffs' lawyer, Elizabeth Cabraser. This class is a challenging one for many students because it dives deeply into a subject that they don't typically encounter in their first year procedure classes: MDL. Elizabeth and I take the students through many of the major controversies in MDL and mass-tort classes, and because of her prominence we attract excellent students. Even among that group—and via Zoom—Sean stood out. He was a regular contributor to class discussions, did outside reading about pending MDLs, and he was not at all intimidated (as many students are) of Elizabeth. His final paper for the class, about diversifying leadership counsel in MDLs, was excellent, well written, and well researched. The seminar is not graded, but if it had been Sean would have been at the top of the class.

Because of Sean's performance in my seminar, I was delighted that he chose to enroll in my course in Conflict of Laws the following spring. It's well understood that Conflicts is not a subject for the faint of heart; it's one of the most challenging classes in the law school, and it attracts a very strong cohort of students who intend to become either litigators or legal academics. Sean, again, was at the very top of the class. Not only was his High Honors grade well deserved on the basis of his final exam, he was easily the top contributor to in-class discussions. One reason, I suspect, that Sean thrived in the "dismal swamp" of choice of law was his background as a summa cum laude graduate of UCLA in Philosophy. He was comfortable parsing complicated texts and competing systems, and he had facility with handing the various theoretical approaches in the class. That said, Sean's head is not in the clouds—although he grappled superbly with the theory, he was attuned to the on-the-ground results and strategic implications of various choice-of-law approaches. All told, in one of the toughest classes in the law school, Sean rose of the top.

I was therefore delighted that Sean sought me out in the fall of his third year to be a research assistant. I am working on several projects related to multidistrict litigation, attorney compensation, and case management. Because of his background in the MDL class, Sean was able to hit the ground running on research, whether it involved scholarship, legal dockets, or caselaw. His research has been impeccable—timely delivered and careful. Moreover, it has been a pleasure to talk through issues with Sean one on one. He is prepared, able to take feedback, and always thoughtful. He has remained my RA through his third year, and he has been absolutely essential to my work.

Currently, Sean is a student in my course in Advanced Civil Procedure and is continuing to perform beautifully. It speaks to both his work ethic and his love of the law that he would take on such a challenge in the spring of his third year. But it is not out of character. He is excellent and I have no doubt that he will be a leading light of the bar. It a pleasure to recommend him to you.

Sincerely,

Andrew D. Bradt
Professor of Law

Law Clerk to the Hon. Robert A. Katzmann, Second Circuit, 2007-2008
Law Clerk to the Hon. Patti B. Saris, D. Mass., 2005-2006

Andrew Bradt - abradt@law.berkeley.edu - 510-664-4984

# SEAN KOLKEY

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The following writing sample is an excerpt from the brief that I prepared for the 2022 McBaine Honors Moot Court Competition, which is exclusive to Berkeley Law students. The McBaine competition is done individually, and this sample is entirely my own work with no assistance from peers or professors. I have omitted significant portions of the brief in the interest of brevity, but I can provide a complete copy if so desired.

## CASE BACKGROUND

In *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) [*Walker II*], an indigent man detained for public intoxication challenged a discriminatory bail policy (the "Standing Bail Order" or "SBO") implemented by the City of Calhoun, Georgia. On paper, the policy provided all detainees with the ability to secure their freedom by immediately posting bail, but in practice that freedom was denied to those who could not afford to pay. While it provided immediate release on recognizance to arrestees who could demonstrate their indigence, the policy authorized the City to detain individuals for up to 48 hours while an indigency determination was made—a detention period that would not be imposed on a wealthy arrestee.

The district court applied heightened scrutiny to the SBO, finding that it violated the equal protection and due process rights of indigent defendants by subjecting them to detention solely because they could not afford bail. As a remedy, the court granted a preliminary injunction requiring that the City make an indigency determination "as soon as practicable, or, at the latest, within twenty-four hours after arrest." *Walker v. City of Calhoun*, 2017 WL 2794064, at *5 (N.D. Ga. June 16, 2017) [*Walker I*].

On appeal, the Eleventh Circuit reversed the district court. Evaluating the petitioner's equal protection claim, the circuit court reasoned that "differential treatment by wealth is impermissible" only when it absolutely deprives the indigent of "some benefit" enjoyed by those with means. *Walker II*, 901 F.3d at 1261. The court held that the SBO did not warrant heightened scrutiny because "Walker and other indigents suffer no 'absolute deprivation' of the benefit they seek, namely pretrial release." *Id*. This brief excerpt addresses the narrow question of whether the SBO should be reviewed with heightened scrutiny under the Equal Protection Clause.